

OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA

Special Report of Investigation

Conducted into the Air-lift Guarantee Agreements which were entered into between  
American Airlines (AA) and Jamaica Vacations Limited (JAMVAC) and  
Supplemental Report of Investigation into the Retention of the Legal Services of the  
Law Firm DunnCox, by JAMVAC

Ministry of Tourism

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A preliminary Requisition/Questionnaire, which was dated 2008 September 5, was sent by the Contractor-General to Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism (MOT).

Further Requisitions/Questionnaires were subsequently directed to other Public Officials, who were considered material to the Investigation.

Where it was deemed necessary, Follow-up Requisitions were directed to a number of Respondents in an effort to clarify certain issues which were identified in their initial declarations and responses. These Follow-up Requisitions were also designed, *inter alia*, to clarify any discrepancy in the information which was supplied by the Respondents.

The Findings of the OCG's Investigation into the Air-lift Guarantee Agreements, which were reportedly entered into between AA and JAMVAC, are premised primarily upon an analysis of the sworn statements and the documents which were provided by the Respondents who were requisitioned by the OCG during the course of the Investigation.

In addition to the core components of its Investigation into the Air-lift Guarantee Agreements, the OCG, as at 2009 November 3, took a decision to incorporate the contract for the retention of legal services by certain senior public officials of JAMVAC as a component of its Investigation.





1. Chicago O'Hare International Airport ("ORD");
2. Dallas/Fort Worth International Airport ("DFW");
3. Miami International Airport ("MIA")

According to Mr. John Lynch, Chairman of the Board, JAMVAC, "*all three agreements were signed contemporaneously prior to August 11, 2008.*"<sup>1</sup>

The Air Service Agreements subsequently came into effect on 2008 November 2 for the Miami and Dallas routes and on 2009 January 31 for the Chicago route.

### **Summary of Key Findings and Conclusions**

Based upon the documents which have been reviewed, as well as the sworn written statements which have been received from the representatives of JAMVAC, TEF, the MOT and the JTB, the OCG has arrived at the following considered Findings and Conclusions:

1. The evidence which has been presented to the OCG has indicated that **JAMVAC initiated the deal with AA** and not the other way around as was falsely asserted by the Hon. Edmund Bartlett in his Cabinet Submission of 2008 September 9. The justification which has been given to the OCG, *inter alia*, includes:
  - a. Representations that AA was making preparations to reduce the number of flights to Jamaica and other destinations in the world;
  - b. AA is one of the largest carriers in the Caribbean and has connecting flights from several other regions in the world;
  - c. Other countries were also forming similar agreements with AA to secure flights to their territories. Therefore, it was deemed to be imperative that JAMVAC got on board in order to save the tourism industry from the possible effects of flight reductions.

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<sup>1</sup> Letter which was dated 2009 December 2 in response to the OCG's Requisition.

2. The evidence which has been adduced by representatives of JAMVAC, the MOT and TEF, in regard to the other airlines which were allegedly approached regarding securing airline seats to Jamaica is, at best, sparse.

The only written indication which was provided that other airlines were approached was correspondence between Air Jamaica and JAMVAC which revealed that Air Jamaica was requesting that an agreement to secure airline seats for the six (6) worst months of the year be signed. This was the only communication submitted to the OCG by Mr. Lionel Reid and Mr. John Lynch as evidence that there was dialogue with Air Jamaica regarding a similar agreement. Both Mr. Lynch and Mr. Reid indicated that they were unable to locate any other communication between JAMVAC and Air Jamaica.

3. Additionally, although it was stated by Mr. Reid and Mr. Lynch that there was dialogue between JAMVAC and US Airways and Delta, neither Mr. Lynch nor Mr. Reid was able to provide the OCG with any evidence to indicate that any formal dialogue took place with US Airways and Delta. In essence, the OCG has not been provided with physical evidence to indicate that other alternatives were weighed by JAMVAC before it was decided that JAMVAC would enter the Air Service Agreements with AA.
4. The OCG has found and concluded that the Air Service Agreements were submitted to the Attorney General's Department for comments prior to their being signed. The submission, which solicited the AG's comments and responses, was made by JAMVAC in 2008 July.
5. Based upon the sworn statements which have been provided to the OCG, the OCG has concluded that the Air Service Agreements between JAMVAC and AA were signed by Mr. John Lynch prior to 2008 August 11.

6. With regard to the Cabinet Submission and Decision regarding the Airlift Guarantee Deal, the OCG found and has concluded that the Cabinet did not come to a decision regarding these Agreements.

In its Requisition to the Cabinet Office, the OCG requested all Cabinet Decisions and Submissions regarding these Agreements. As at 2009 November 3, the only Cabinet Decision regarding these Agreements was a provisional Cabinet Decision. The referenced Cabinet Decision indicated that this “matter should be withdrawn from the Agenda until further consultation on the recommendations and alternative proposals, including consultations with the Attorney General’s Department.” (OCG’s Emphasis).

It should also be noted that up to the date of the response from the Cabinet Office, i.e. 2009 November 3, and the date of the writing of this Report, the OCG has not been provided with any other Cabinet Decision which states that these Agreements were approved by the Cabinet.

7. Based upon the compendium of facts, including the date on which the Air Service Agreements were signed, the date on which the Cabinet Submission was made and the fact that the Cabinet made no conclusive decision regarding the Air Service Agreements, the OCG has been led to conclude the following:
  - a. The Air Service Agreements were improperly and irregularly awarded as the approval requirements which were held out by JAMVAC as being a necessary requirement for the consummation of the contract were never received;
  - b. The fact that the Air Service Agreements were signed prior to 2008 August 11, and, consequently, before the submission for approval was made to the Cabinet, meant that the approval process would have been



As such, the OCG has concluded that JAMVAC relied upon the advice of both the Attorney General's Department and the Ministry of Finance and the Public Service which proffered that the Air Service Agreements did not fit within the parameters of the GOJ Procurement Procedures.

11. The OCG has found and concluded that TEF approved the funds for financing the US\$4.5 Million Guarantee Deal in its Board meeting of 2008 July 23.
12. The Findings of the Investigation have revealed and have subsequently led the OCG to conclude, based upon the sworn and written testimony of Mr. John Lynch and Mr. Lionel Reid, that, up to 2009 November 2, no money had been paid to AA by JAMVAC, TEF and/or by the Government of Jamaica in regard to the US\$4.5 Million Airlift Guarantee Deal.
13. The OCG has concluded that the contract for the retention of the legal services of DunnCox was both improperly and irregularly awarded when measured against the requirements of Section 4 (1) of the Contractor General Act. This conclusion is premised upon the fact that neither the Permanent Secretary in the MOT nor the Board of JAMVAC had granted permission for the execution of the contract as at 2009 June 9. Further, a signed contract was not executed between DunnCox and JAMVAC until 2009 June 26.

Despite this fact, DunnCox had began rendering services to JAMVAC from as early as 2009 June 9 and had billed the Public Body for same. The Board of JAMVAC eventually granted its approval for the contract with DunnCox and regularized same at its Board Meeting of 2009 June 25 – but only after the OCG had formally written, on 2009 June 10, to the Permanent Secretary in the MOT, to enquire into and to raise its strong concerns regarding the matter.



17. In light of the challenges which have been faced by the OCG during the conduct of its Investigation, it must be concluded that both Public Officials and private individuals, and contractors, as was evidenced by the conduct of the Office of the Cabinet and the law firm, DunnCox, in the instant matter, are not fully apprised and or appreciative of the Contractor General Act and, in particular, the reach and implications of Section 18 (4) of the Contractor General Act.

In light of the foregoing, and having regard to the Findings and Conclusion which are discussed in greater detail in this Report, the OCG has respectfully made the following considered Referrals and Recommendations.

### **Referrals**

The OCG, in the conduct of its Investigation, is required to be guided by Section 21 of the Contractor-General Act.

**Section 21 of the Contractor-General Act** provides as follows:

**“If a Contractor-General finds, during the course of his Investigations or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer or member of a public body, he shall refer the matter to the person or persons competent to take such disciplinary or other proceeding as may be appropriate against that officer or member and in all such cases shall lay a special report before Parliament.”**<sup>2</sup> (OCG Emphasis)

1. Pursuant to the mandatory statutory obligations which are imposed upon a Contractor General by Section 21 of the Contractor General Act, the OCG is hereby formally referring a copy of this Report to the Attorney General for her to determine and to advise what steps may be taken to censure and/or to hold to account the Hon. Edmund

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<sup>2</sup> Contractor-General Act. 1983

















*This approach was apparently taken in anticipation that one or two Board Members may have asked searching questions or challenges to the request as being completely outside of the mandate of the Tourism Enhancement Fund (T.E.F) ”<sup>3</sup>*

The second event, which influenced the OCG’s decision to commence its Investigation, was as a result of certain allegations and comments that were published in a media article in the Daily Gleaner of 2008 September 4, which was entitled “*American Airlines paid to stay*” and a subsequent media article in the Daily Gleaner of 2008 September 5, which was entitled “*Air Jamaica livid - Pennicook criticises Government - Tourism minister defends American Airlines deal*”.

The Gleaner article, which was dated 2008 September 4, quoted Mr. Godfrey Dyer, the Chairman of the TEF as saying “*It is a very good investment. This is something that we support, and when it came before my board, we examined it and we believed it would be money well spent.*”<sup>4</sup>

The Gleaner article, which was dated 2008 September 5, that was entitled “*Air Jamaica livid - Pennicook criticises Government - Tourism minister defends American Airlines deal*”, reported, *inter alia*, that:

*“The Management of Air Jamaica is livid over the Government's decision to give American Airlines (AA) a US\$4.5- million (J\$324 million) guarantee to encourage flights to the island. ...*

*... "American will be able to get persons from communities from around the airports and Air Jamaica does not have the planes going into the communities around the gateways," Bartlett argued.*

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<sup>3</sup> Letter of Complaint dated 2008 August 12 from concerned citizen to the OCG. (See Appendix I)

<sup>4</sup> Gleaner article dated 2008 September 4 entitled, American Airlines paid to stay.





The OCG's Investigation primarily sought to determine, *inter alia*, (a) the procurement process which was employed by the JAMVAC in regard to the 'Air Service Agreements' with AA, (b) whether there were breaches of the Government's procurement procedures, and (c) whether the process which led to the award of the contracts that were entered into with AA were fair, impartial, transparent and were awarded on merit.

At the commencement of its Investigation on 2008 September 5, the OCG undertook a preliminary review of the allegations in an effort to inform the direction of the Investigation as well as to determine the most efficacious method by which to proceed.

The Terms of Reference of the OCG's Investigation into the Air-lift Guarantee Agreements, which were reportedly entered into between AA and JAMVAC, were primarily developed in accordance with the provisions which are contained in Section 4 (1) and Section 15 (1) (a) to (d) of the Contractor General Act.

Additionally, the OCG was guided by the recognition of the very important responsibilities which are imposed upon Public Officials and Officers by, *inter alia*, the Contractor General Act, the Government Procurement Procedures Handbook (GPPH) (2001 May), the Financial Administration and Audit Act, the Public Bodies Management and Accountability Act, Staff Orders for the Public Service (2004), as well as the Corruption Prevention Act.

The Findings of the OCG's Investigation into the Air-lift Guarantee Agreements, which were reportedly entered into between AA and JAMVAC, are premised primarily upon an analysis of the sworn statements and the documents which were provided by the Respondents who were requisitioned by the OCG during the course of the Investigation.

In addition to the core components of its Investigation into the Air-lift Guarantee Agreements, the OCG, as at 2009 November 3, took a decision to incorporate the

contract for the retention of legal services by certain senior public officials of JAMVAC as a component of its Investigation.

The legal services of the law firm DunnCox were retained by JAMVAC to provide the OCG with written responses to its Requisitions which had been directed to Mr. John Lynch, Chairman of the Board of Directors of JAMVAC and Mr. Lionel Reid, JAMVAC's Executive Director.

In this regard, the OCG, upon being advised, by way of letter which was dated 2009 June 9, by the law firm DunnCox, that it now acts *'for and on behalf of Jamaica Vacations Limited (JAMVAC) and the Tourist Enhancement Fund (TEF)'* and that its services were *"retained to assist JAMVAC and TEF with its compliance to the said requests,"* began monitoring the retention of the referenced legal services, pursuant to Section 4 (1) of the Contractor General Act.

Consequently, by way of letter, which was dated 2009 June 10, the OCG wrote to the Permanent Secretary in the MOT, Mrs. Jennifer Griffith, raising, *inter alia*, certain critical governance issues and advised her of its decision *"... inter alia, to monitor the procurement of the legal services which are being provided by DunnCox, to the named representatives of JAMVAC and TEF."*

Subsequently, it must be noted, the referenced legal services, which were provided by DunnCox, were retained solely by JAMVAC, on behalf of Mr. John Lynch, Chairman of the Board, JAMVAC and Mr. Lionel Reid, Executive Director, JAMVAC.

The OCG's Findings and considered Recommendations regarding the DunnCox retention are included herein as a "Supplemental Report" to the OCG's Report of Investigation into the Air-lift Guarantee Agreements.

## **TERMS OF REFERENCE**

### ***Primary Objectives***

The primary aim of the Investigation was to determine, *inter alia*, whether there was compliance with the provisions of the 2001 GPPH, the Contractor-General Act (1983), the Corruption Prevention Act and the Public Bodies Management and Accountability Act.

The following specific objectives were targeted:

### ***Specific Objectives***

The Investigation also had the following specific objectives:

1. Identify the procurement process which was employed by JAMVAC for the Air-lift Guarantee Agreements which were consummated with American Airlines;
2. Determine whether there were breaches of the Government's procurement procedures on the part of JAMVAC, or anyone acting on its behalf, in the execution of any aspect of the transaction for the Air-lift Guarantee Agreements with American Airlines;
3. Determine whether the contract(s)/Air Service Agreement(s) which was/were entered into with American Airlines was/were awarded fairly and on merit;
4. Determine whether the process which led to the award of the contract(s)/Air Service Agreement(s) that was/were entered into with American Airlines was/were fair, impartial and transparent.

## METHODOLOGY

The OCG, in the conduct of its Investigations, has developed standard procedures for evidence gathering. These procedures have been developed and adopted pursuant to the powers which are conferred upon a Contractor-General by the 1983 Contractor-General Act.

It is instructive to note that Section 17 (1) of the Contractor-General Act empowers a Contractor-General “to adopt whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of (the) Act, to obtain information from such person and in such manner and make such enquiries as he thinks fit.” (OCG Emphasis).

The Terms of Reference of the OCG’s Investigation into the American Airlines Air-Lift Guarantee Deal, were primarily developed in accordance with those of the mandates of the Contractor-General which are stipulated in Section 4 (1) and Section 15 (1) (a) to (d) of the Contractor-General Act.

The Terms of Reference of the Investigation, and the development of the written Requisitions/Questionnaires that were utilized throughout the course of the Investigation, were guided by the OCG’s recognition of the far-reaching responsibilities and requirements that are imposed upon Public Officials and Public Officers by the GPPH, the Public Bodies Management and Accountability Act, the Contractor General Act, Staff Orders for the Public Service (2004), and the Corruption Prevention Act.

In addition, the OCG was guided by Section 21 of the Contractor-General Act which provides that “If a Contractor-General finds, during the course of his Investigations or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer or member of a public body, he shall refer the matter to the person or persons competent to take such disciplinary or other proceeding

**as may be appropriate against that officer or member and in all such cases shall lay a special report before Parliament.**” (OCG Emphasis).

A preliminary Requisition/Questionnaire, which was dated 2008 September 5, was sent by the Contractor-General to Mrs. Jennifer Griffith, Permanent Secretary, MOT.

Further Requisitions/Questionnaires were subsequently directed to other Public Officials, who were considered material to the Investigation.

Where it was deemed necessary, Follow-up Requisitions were directed to a number of Respondents in an effort to clarify certain issues which were identified in their initial declarations and responses. These Follow-up Requisitions were also designed, *inter alia*, to clarify any discrepancy in the information which was supplied by the Respondents.

The Requisitions/Questions which were utilized by the OCG included specific questions that were designed to elucidate critical information from Respondents on the matters which were being investigated.

However, in an effort to not limit and/or exclude the disclosure of information which was germane to the Investigation but which might not have been specifically requisitioned by the OCG, the OCG asked all Respondents the following question:

*“Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same.”*

**Very importantly, the form of written Requisition, which was utilized by the OCG, also required each Respondent to provide, under the pain of criminal prosecution, complete, accurate and truthful written answers to a specified list of written**

**questions and to make a formal declaration attesting to the veracity of same before a Justice of the Peace.**

The Requisitions were issued pursuant to the powers that are reserved to the Contractor-General under the Contractor-General Act and, in particular, Sections 4, 15, 17, 18 and 29 thereof. The Requisitions were also issued pursuant to Sections 2 and 7 of the Voluntary Declarations Act and Section 8 of the Perjury Act.

It is instructive to note that **Section 18 (2) of the Contractor-General Act** provides that, “*Subject as aforesaid, a Contractor-General may summon before him and examine on oath –*

- a. any person who has made representations to him; or*
- b. any officer, member or employee of a public body or any other person who, in the opinion of the, Contractor-General is able to furnish information relating to the Investigation,*

**and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act.**” (OCG Emphasis).

Further, **Section 18 (3) of the Contractor-General Act** provides that, “**For the purposes of an Investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents**”. (OCG Emphasis).

**Section 2 (1) of the Voluntary Declarations Act** provides that, “*In any case when by any statute made or to be made, any oath or affidavit might, but for the passing of this Act, be required to be taken or made by any person or persons on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful to substitute a declaration in lieu thereof*

*before any Justice; and every such Justice is hereby empowered to take and subscribe the same.*” (OCG Emphasis).

**Section 7 of the Voluntary Declarations Act** provides that, *“In all cases when a declaration in lieu of an oath or affidavit shall have been substituted by this Act, or by virtue of any power or authority hereby given, or when a declaration is directed or authorized to be made and subscribed under the authority of this Act, or of any power hereby given, although the same be not substituted in lieu of an oath, heretofore legally taken, such declaration, unless otherwise directed under the powers hereby given, shall be in the form prescribed in the Schedule.”*

**Section 8 of the Perjury Act** provides, *inter alia*, that, *“Every person who knowingly and willfully makes (otherwise than on oath) a statement false in a material particular and the statement is made-*

*(a) in a voluntary declaration; or ....*

*(c) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any enactment for the time being in force,*

*shall be guilty of a misdemeanour, and liable on conviction on indictment thereof to imprisonment with hard labour for any term not exceeding two years, or to a fine, or to both such imprisonment and fine”.*

The material import of the foregoing, *inter alia*, is that the sworn and written evidence that is provided to a Contractor General, in response to his Statutory Requisitions, during the course of his Investigations, is (a) provided in accordance with certain specified provisions of the Statutory Laws of Jamaica, and (b) provided in such a manner that if any part thereof is materially false, the person who has provided same would have, ***prima facie***, committed the offence of Perjury under Section 8 of the Perjury Act and, as will be seen, would have also, ***prima facie***, committed a criminal offence under Section 29 (a) of the Contractor General Act.

The OCG considers the above-referenced evidence-gathering procedures to be necessary in order to secure, *inter alia*, the integrity and evidentiary cogency of the information which is to be elicited from Respondents. The implications of the subject requirements also serve to place significant gravity upon the responses as well as upon the supporting documents which are required to be provided by Respondents.

**It is instructive to note that the OCG, in the conduct of its Investigation, prefers to secure sworn written statements and declarations from Respondents, under the pain of criminal prosecution. This ensures, *inter alia*, that there is no question as to what has been represented to the OCG. Nor will there be any doubt as to the integrity or credibility of the information which is furnished to the OCG and on which its consequential Findings, Conclusions, Referrals and Recommendations will be necessarily based.**

The OCG also went to great lengths to ensure that Respondents were adequately and clearly warned or cautioned that should they mislead, resist, obstruct or hinder a Contractor-General in the execution of his functions or fail to provide a complete, accurate and truthful response to any of the Requisitions or questions which were set out in its Requisition, they would become liable, *inter alia*, to criminal prosecution under Section 29 of the Contractor-General Act.

**Section 29 of the Contractor-General Act** provides as follows:

*“Every person who -*

*(a) willfully makes any false statement to mislead or misleads or attempts to mislead a Contractor-General or any other person in the execution of his functions under this Act; or*

*(b) without lawful justification or excuse -*

*i. obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or*





- c) Mr. John Lynch, Chairman of the Board, JAMVAC;
  - d) Mr. Ian Neita, Executive Director, TEF;
  - e) Mr. Godfrey Dyer, Chairman of the Board, TEF;
  - f) Hon. Edmund Bartlett, Minister of Tourism;
  - g) Mr. Anthony King, Regional Director, Airline and Tour Operator, JTB;
  - h) Ambassador Douglas Saunders, C.D., Cabinet Secretary, Office of the Cabinet.
2. Follow up Requisitions/Questionnaires, requesting clarification on certain issues, were directed by the OCG to the following Public Officials:
- a) Mr. Lionel Reid, Executive Director, JAMVAC;
  - b) Mr. John Lynch, Chairman of the Board, JAMVAC;
  - c) Mrs. Jennifer Griffith, Permanent Secretary, MOT.
3. A detailed review of the **sworn** certified statements, supporting documents and the records which were provided by the Respondents to the OCG's Requisitions, was undertaken.
4. The OCG also extended formal invitations to representatives of AA to supply information with regard to the Investigation. The OCG's Letters of Invitation, which were dated 2009 June 1, were directed to:
- a) Mr. Peter Dolara, Senior Vice President, Miami, Caribbean and Latin America.
  - b) Mr. Walter J. Aue, Vice President, Capacity and Planning.
5. In order to complete its 'Supplemental Report' regarding the legal services which had been retained by JAMVAC, and which was being provided by the Law Firm of DunnCox, the OCG directed a Formal Written Requisition to DunnCox.

## **FINDINGS**

### **The Air Service Agreements between JAMVAC and AA**

The OCG found that three (3) Air Service Agreements were consummated between JAMVAC and AA in regard to the provision of passenger air services between Montego Bay, Jamaica and three (3) international Airports in the United States of America, namely:

1. Chicago O'Hare International Airport ("ORD");
2. Dallas/Fort Worth International Airport ("DFW");
3. Miami International Airport ("MIA").

The Air Service Agreements between JAMVAC and AA came into effect at the start of the 2008/2009 winter tourist season.

The effective dates for the respective routes, as indicated in the Air Service Agreements which were submitted to the OCG, are as follows:

Route	Date of Signing Contract (AA)	Effective Date of Agreement	Termination Date
Miami	2008 August 11	2008 November 2	2009 November 18
Dallas	2008 August 11	2008 November 2	2009 November 18
Chicago	2008 August 11	2009 January 31	2010 January 30.

Captioned information extracted from the respective Air Service Agreements.

The referenced Agreements were consummated between "*American Airlines Inc., a Delaware corporation with its principal offices, which is located at... Dallas/Fort Worth International Airport, Texas...*" and JAMVAC. Under the agreements, JAMVAC

provided a guarantee of US\$4.5 million (US\$1.5 million for each route) to AA for additional airline seats to Jamaica.<sup>6</sup>

All of the referenced Air Service Agreements were signed by Mr. John Lynch, Chairman of the Board, JAMVAC and Mr. Walter J. Aue, Vice President, Capacity Planning, AA.

Further, and according to Mr. John Lynch, he does not “...recall the exact date [he] signed the agreements however all three agreements were signed contemporaneously prior to August 11, 2008.”<sup>7</sup>

### **The Genesis of the Air Service Agreements between JAMVAC and AA**

In order to elucidate how the Air Service Agreements were initiated, the OCG, by way of a letter, which was dated 2008 September 5, requested that the Permanent Secretary in the MOT, Mrs. Jennifer Griffith, provide details in regard to the genesis of the referenced agreements.

In its Requisition, which was dated 2008 September 5, the OCG requested that the Permanent Secretary provide, *inter alia*, “An Executive Summary outlining:

- a. *The genesis of the agreement;*
- b. *The procurement methodology employed;*
- c. *The name and title of all actors involved in the process;*
- d. *The approvals received at varying levels;*
- e. *The value of the consideration;*
- f. *The nature of the agreement;*
- g. *How the negotiations were conducted.”*<sup>8</sup>

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<sup>6</sup> The Air Service Agreements between JAMVAC and AA.

<sup>7</sup> Letter which was dated 2009 December 2 in response to the OCG’s Requisition.

<sup>8</sup> OCG’s Requisition which was dated 2008 September 5, to Mrs. Jennifer Griffith, Permanent Secretary, MOT.

By way of a letter, which was dated 2008 September 17, Mrs. Jennifer Griffith responded to the OCG's Requisition and stated, *inter alia*, that:

*“With the recent repositioning of JAMVAC the agency is expected to enter into agreements or special arrangements with airlines servicing various strategic gateways from Europe, North America, etc. Each carrier brings to the table a unique blend of routes, service quality and seat support risks which are usually not interchangeable.*

*Recognizing the current challenges and uncertainties in the airline industry globally, and the need for additional airlift to satisfy the demand created by the increase in room stock in Jamaica, **JAMVAC in pursuit of its primary objectives and core function accepted a verbal, unsolicited proposal from American Airlines to provide additional service from three (3) gateways in the United States of America.** (OCG Emphasis) The matter was ultimately brought to the attention of the Executive Director of JAMVAC and the Hon. Minister of Tourism, as well as the Members of JAMVAC's Board of Directors and the Permanent Secretary in the Ministry of Tourism. The Minister of Tourism sought support from the Honorable Prime Minister and entered into discussions with the Minister of Finance and Public Service. Discussions and negotiations continued over the ensuing months. The Contracts were also sent to the Attorney General's Chambers for comments.*

*American Airlines is the preferred airline for such an arrangement because of its extensive network of domestic flights into the gateway cities from which the additional flights to Jamaica will depart. They also have connecting flights from Europe, India, China and Brazil and other emerging markets which are now being targeted for the growth and expansion of Jamaica's tourist industry.*

*In the meantime the Government of Jamaica has announced its intention to divest Air Jamaica by the 31<sup>st</sup> March 2009.*

*It is against this background that JAMVAC formed the strategic alliance which resulted in the signing of the Air Service Agreements.*

***Procurement methodology employed***

*To give effect to this mandate JAMVAC responds to economic opportunities through the provisions of incentives to commercial airlines in order to increase airlift into Jamaica. With regard to the arrangement with American Airlines, this is really a contingent guarantee that may or may not result in actual payment of cash.*

*The many permutations associated with the operations of Jamaica Tourist Board and Jamaica Vacations Ltd. have rendered it difficult to always apply the standard procurement procedures for the purchasing of goods and services as outlined in the Government Procurement Procedures Handbook.*

***Recognizing this difficulty, there has been ongoing discussions both with the NCC and the Ministry of Finance and Public Service. The outcome of which is inclusion in a Cabinet Submission from the Ministry of Finance and Public Service a request for partial exemption from standard procurement requirements for JTB and JAMVAC. (That Submission was not sent to the Permanent Secretary in the Ministry of Tourism) The Cabinet Decision has not yet been circulated.”<sup>9</sup> (OCG Emphasis)***

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<sup>9</sup> Letter which was dated 2008 September 17, from Mrs. Jennifer Griffith, Permanent Secretary, MOT, in response to the OCG’s Requisition.



*My earliest official involvement was a request by Hon. Edmund Bartlett, Minister of Tourism, on May 13, 2008, to prepare a letter to the Hon. Prime Minister requesting his support for Jamaica to get additional funding for an Airline Seat Support programme with American Airlines and European Carriers...*

*Based on a subsequent letter (dated June 10, 2008, ...), from Hon. Minister Audley Shaw to Hon. Minister Bartlett regarding the commitment of US\$4.5M, I advised the Hon. Minister Bartlett to request the additional funds by way of a Cabinet Submission, since the Ministry's overall budget could not support this proposal.*

*At this juncture, I prepared a Cabinet Submission dated June 11, 2008, requesting additional funds for Airline Seat Support out of North America and Europe. The Submission was subsequently withdrawn since the Minister was discussing other options with the Minister of Finance and the Public Service. I was not involved in those discussions.*

*Mr. John Lynch was advised of the Cabinet Submission. I was copied on a letter from Mr. John Lynch to Mr. Peter Dolora dated June 12, 2008...*

*I am aware that Mr. Lionel Reid and Mr. Lynch met with representatives from American Airlines and I was subsequently copied on correspondence from Mr. Reid to Hon. Minister Bartlett titled **"Report of meeting with American Airlines regarding Air Service Agreement"** dated July 7, 2009...*

*Mr. Reid and I reviewed the American Airlines contract and agreed to submit same to the Attorney General for comments. I was copied the correspondence, dated July 9, 2008, from Mr. Reid to Senator Hon. Dorothy Lightbourne, Minister of Justice and Attorney General...*



*On my departure for vacation leave, July 14 – August 20, the matter was still being discussed internally and funds were not yet approved by Ministry of Finance and the Public Service. We had also not yet received a response from the Attorney General.*

*On my return to office on August 21, 2008, I saw documentation indicating that a request was made to the Tourism Enhancement Fund and that the funds were approved for the guarantee at the Board meeting of July 23. A response was also received from the Attorney General and further discussions were held with American Airlines...*

*On September 4, 2008 I received a letter from Mr. Craig Beresford from the Office of the Contractor General (OCG)..., asking for information “**Re: Alleged Guarantee to American Airline for US\$4.5 Million**” for which I prepared a response as copiously as I could and submitted all information available to me... I subsequently received a letter acknowledging receipt. There was no further communication on the matter from the OCG until the recent request of May 27, 2009.*

*I prepared a Cabinet Submission dated September 9<sup>th</sup> requesting approval for JAMVAC to enter into contract with American Airlines and for the Tourism Enhancement Fund to facilitate the guarantee. The Submission was not taken at Cabinet.*

*Having made the initial submission to the OCG everything was subsequently put on hold until we were in receipt of Ministry of Finance and the Public Service Circular #34 dated September 22, 2008..., which outlined entities (including JAMVAC) which were granted partial exemption from the standard procurement procedures. We also received a letter from the Ministry of Finance and the Public Service to Mr. Lionel Reid (dated October 14, 2008) which concluded that the arrangement with American Airlines was not a procurement contract. I am aware that Mr. Reid subsequently signed the Agreements and that the letter of Credit was processed by the TEF. During the month of October, I was copied on correspondence between Hon. Prime Minister and Mr. Lionel Reid; Minister Bartlett and Mr. Reid; and Mr. Reid and Mr. Neita...*

*Subsequently, I received a copy of a revised opinion from the Attorney General... ”<sup>12</sup>*

Mr. Ian Neita, in his sworn response to the OCG’s Requisition, which was dated 2009 July 1, indicated that:

*“My understanding of the American Airlines Air-Lift Guarantee Deal is as follows:*

- (a) Jamaica has a need to increase the number of tourists arriving in the Island to meet the objective of having five million visitors per annum within five years.*
- (b) The recent expansion in room stock requires a sharp increase in arrivals if average occupancy levels are not to be negatively affected.*
- (c) Because of the downturn in the Airline Industry there is a need to be proactive to secure airlift into the country as airlines have been cutting back on routes.*

*It is my understanding that discussions were held between executives of JAMVAC and American Airlines leading to American Airlines agreeing to increase its flights to Jamaica through three USA gateways namely:*

*Chicago Ohare – Five flights per week for one year*

*Dallas – Five flights per week for one year*

*Miami – Seven flights per week for one year*

*In order for American Airlines to enter into an Air Service Agreement it required that its risk be mitigated by the issuance of a guarantee in the amount of*

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<sup>12</sup> Letter which was dated 2009 June 18, from Mrs. Jennifer Griffith, Permanent Secretary, MOT, in response to the OCG’s Requisition.

*US\$1,500,000 per gateway for a total of US\$4,500,000. The Air Service agreement is designed to ensure that American Airlines does not lose money on the operations of these flights. The agreement establishes the Minimum Revenue Required. At the end of the period (one year) a comparison is done Total Revenue and Minimum Revenue required. If there is an excess it goes to American Airlines as surplus on operations. However, if there is a shortfall JAVVAC [sic] will be billed for the amount. The guarantee supports the payment of any shortfall.”<sup>13</sup>*

Mr. Godfrey Dyer, in his sworn response to the OCG’s Requisition, which was dated 2009 July 2, indicated that:

*“The extent of my knowledge of the American Airlines Airlift Deal is that it was a guarantee for three flights out of Miami, Chicago and Dallas at \$1.5 million each. These amounts were to be put into an escrow account for one year and the funds will only be paid out if over the period the minimum guaranteed load was not achieved.*

*These flights would be in addition to the airline’s regular schedule flights”<sup>14</sup>*

Mr. John Lynch, in his sworn response to the OCG’s Requisition, which was dated 2009 July 16, and more specifically, in direct response to a question pertaining to the extent of his personal and/or official involvement in the AA Air Lift Guarantee Deal, indicated that:

*“In the latter part of year 2007, Jamaica experienced a rapid expansion in the number of hotel rooms available for tourists. As a result JAMVAC realized that what Jamaica really needed to keep up with the said expansion was more flights, in particular legacy carriers, to transport tourists to Jamaica. Legacy carriers,*

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<sup>13</sup> Letter which was dated 2009 July 1, from Mr. Ian Neita, in response to the OCG’s Requisition.

<sup>14</sup> Letter which was dated 2009 July 2, from Mr. Godfrey Dyer, in response to the OCG’s Requisition. (See Appendix I)

*due to their integration and position in crucial airports in the United States, have access to millions of travelers.*

*In or between December 2007 and January 2008, American Airlines (hereinafter referred to as "AA") indicated its intention to severely decrease the number of its flights to the Caribbean, including Jamaica. The global climate as at that time was that the price of oil had started to increase at an alarming rate, thus resulting in a higher cost of airline tickets and less persons travelling.*

*Based on AA's pronouncement to reduce its flights to Jamaica, I spoke to.[sic] the Minister of Tourism, the Honourable Mr. Edmund Bartlett, and it was decided that it was imperative to take some form of action with a legacy carrier to ensure that Jamaica continued to enjoy a steady flow of patrons to the island. For the past thirty years, AA has been the largest airline to service the Caribbean. AA has three main hubs: Miami, Dallas and Chicago. In those hubs, AA enjoys approximately thirty-eight million passengers travelling through Dallas on its flights, approximately twenty-three million passengers travelling through Miami on its flights, and approximately 19 million passengers travelling through Chicago on its flights. Accordingly, it was agreed that I would approach AA, namely Mr. Peter Dolara, Vice President of AA for Latin America, to see if Jamaica could negotiate more AA flights to the island, which I did. (OCG Emphasis)*

*On or about March 22, 2008, a meeting was held in Miami between Mr. Dolara, Mr. Gary Alfson of AA, the Minister of Tourism and myself with the purpose of trying to ensure AA's continued travel to Jamaica. At the meeting, negotiations commenced with regard to establishing more flights to Jamaica from AA's major hubs, those being Dallas, Miami, and Chicago. At the conclusion of this meeting, AA agreed to send JAMVAC a draft agreement for consideration by the relevant parties.*

*In or about early May 2008, I indicated to the Minister of Tourism that it would be possible to secure an arrangement with AA which would guarantee a certain number of flights from AA's hubs at Miami, Chicago, and Dallas, however AA required a guarantee in the sum of US\$1,500,000.00 for each hub, totalling US\$4,500,000.00. It should be noted that AA has similar deals with St. Lucia, Antigua, St. Kitts, Bermuda, and Aruba, to which similar guarantees were required. I further indicated that neither the Jamaica Tourist Board nor JAMVAC, were in a position financially to supply the requisite guarantees and that assistance would be required in securing the same.*

*As a result of this discussion, the Minister of Tourism wrote a letter dated May 13, 2008 to the Prime Minister, the Honourable Mr. Bruce Golding O.N., indicating the need for the guarantees. The Prime Minister verbally responded to the Minister indicating that the Ministry of Tourism should seek the assistance of the Ministry of Finance. Subsequently, I wrote to the Honourable Mr. Audley Shaw, Minister of Finance, requesting the said guarantees. By letter dated June 10, 2008, Minister Shaw indicated that the Ministry of Finance could not provide the requisite guarantees. It is unknown as to why the Ministry of Finance did not provide such guarantees.*

*On July 3, 2008, I attended a meeting at the Miami Regional Office of American Airlines (hereinafter referred to as "AA"). Present at that meeting were Mr. Peter Dolara, ,[sic] Mr. Gary Alfson, Mr. Lionel Reid, Executive Director of JAMVAC, and myself. The purpose of the meeting was to finalize negotiations and future contractual arrangements previously conducted. I refer to a Memorandum dated July 7, 2008 drafted by Mr. Lionel Reid to the Honourable Mr. Edmund Bartlett, Minister of Tourism, which gives a detailed account of the said meeting.*

*At the said meeting, Mr. Reid and I addressed two requirements in the contracts, which had been received previously, namely the quantum of the guarantees and*

*the maintenance of commercial General Liability insurance in the amount of US\$25,000,000.00. JAMVAC did not possess the requisite funds in order to fulfil these requirements. During the said meeting, Mr. Reid attempted to negotiate lower sums for these requirements. JAMVAC was emphatically told by AA that these clauses were non-negotiable and that these contracts are standard contracts which have been executed with other jurisdictions. If JAMVAC wanted to make changes, there would be no agreement with AA.*

*As JAMVAC did not possess the requisite funding to satisfy the contracts, and in particular the guarantee, in or about July 2008, Mr. Reid submitted a proposal to the Tourism Enhancement Fund (hereinafter referred to as "TEF") to see if TEF was in a position to provide the requisite guarantees. The Board of TEF agreed to provide the requisite guarantees in the form of letters of credit.*

*The contracts were thereafter submitted to the Permanent Secretary of the Ministry of Tourism for the purpose of obtaining approval of Cabinet and the agreements were subsequently executed.*"<sup>15</sup>

Mr. Lionel Reid, in his sworn response to the OCG's Requisition, which was dated 2009 July 16, indicated that:

*"Prior to my appointment as Executive Director, I served on the Board of JAMVAC. Thus I had knowledge of Mr. John Lynch's negotiations with AA as said negotiations were conducted with the Board's knowledge and approval."*

Further, in his response to the OCG's Requisition regarding the extent of his official and/or personal involvement in the American Airlines Air-Lift Guarantee Deal, Mr. Reid, in his sworn statement to the OCG, indicated as follows:

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<sup>15</sup> Letter which was dated 2009 July 16, from Mr. John Lynch, in response to the OCG's Requisition.

*“I joined Jamaica Vacations Limited (hereinafter referred to as “JAMVAC”) as their Executive Director on June 2, 2008.*

*On July 3, 2008, I attended a meeting at the Miami Regional Office of American Airlines (hereinafter referred to as “AA”). Present at that meeting was Mr. Peter Dolara, Senior Vice President of AA, Mr. Gary Alfson of AA, Mr. John Lynch, Chairman of JAMVAC, and myself. The purpose of the meeting was to finalize negotiations and future contractual arrangements previously conducted by Mr. John Lynch, Chairman of the Board of JAMVAC. I refer to a Memorandum dated July 7, 2008 drafted by me to the Honourable Mr. Edmund Bartlett, Minister of Tourism, which gives a detailed account of the said meeting.*

*Prior to the said meeting, I received draft contracts prepared by AA for the purpose of finalizing the negotiations. In the said contracts, two requirements caused concern, namely: the quantum of the guarantees and the maintenance of commercial General Liability insurance in the amount of US\$25,000,000.00. JAMVAC did not possess the requisite funds in order to fulfil these requirements. During the said meeting, I attempted to negotiate lower amounts for these requirements. I was emphatically told by AA that these clauses were non-negotiable. The contracts presented are standard contracts which have been executed with other jurisdictions. If JAMVAC wanted to make changes, there would be no agreement with AA.*

*I forwarded these said contracts to the Office of the Attorney General, by way of letter dated July 9, 2008, for the purpose of receiving their advice as to the same. The Attorney-General’s Chambers responded by way of letter dated July 22, 2008. Further to receiving the said advice, I arranged a conference call with Mr. Alfson and Ms. Karen Zapata of AA to discuss further possible amendments to the contracts. I refer to a letter dated July 24, 2008, which details the contents of the said conference call.*

*As JAMVAC did not possess the requisite funding to satisfy the contracts, and in particular the guarantee, in or about July 2008, at the instruction of Mr. Lynch, I submitted a proposal to the Tourism Enhancement Fund (hereinafter referred to as “TEF”) to see if TEF was in a position to provide the requisite guarantees. Unfortunately, I cannot locate a copy of this said proposal. However, subsequent to the submission of the proposal, the Board of TEF agreed to provide the requisite guarantees in the form of letters of credit.*

*The contracts were thereafter submitted to the Permanent Secretary of the Ministry of Tourism for the purpose of obtaining approval of Cabinet and the agreements were subsequently executed.”<sup>16</sup>*

Minister Edmund Bartlett, in his sworn response to the OCG’s Requisition, which was dated 2009 July 8, and in particular regard to the extent of his knowledge of the American Airlines Air-lift Guarantee Deal, indicated that:

*“In or between December 2007 and January 2008, American Airlines (AA) indicated its intention to severely decrease the number of its flights to the Caribbean, including Jamaica. The global climate at that time was that the price of oil had started to increase at an alarming rate, thus resulting in a higher cost of airline tickets and less persons travelling.*

*Such a decision by AA would have had a devastating effect on the tourism industry in Jamaica spawning a domino effect: less patrons would result in less rooms being occupied, which would result in hotels struggling to stay afloat and the redundancy of employees. Moreover Jamaica, and in particular Montego Bay, in the recent year was faced with the opening up of two thousand (2,000) new hotel rooms, in addition to the already existing one thousand (1,000) rooms. It was imperative that these rooms were filled with patrons.*

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<sup>16</sup> Letter which was dated 2009 July 8, from Mr. Lionel Reid, in response to the OCG’s Requisition.



*Based on AA's pronouncement to reduce its flights to Jamaica, I spoke to Mr. John Lynch, the Chairman of Jamaica Vacations Limited (JAMVAC), and it was decided that it was imperative to take some form of action with a legacy carrier to ensure that Jamaica continued to enjoy a steady flow of patrons to the island. For the past thirty years, AA has been the largest airline to service the Caribbean. Thirty-eight million travelers pass through their hubs in Miami, Dallas, and Chicago each year. Accordingly, it was agreed that Mr. Lynch would approach AA, namely Mr. Peter Dolora, Vice President of AA for Latin America, to see if Jamaica could negotiate more AA flights to the island, which he did. (OCG Emphasis)*

*On or about March 22, 2008, a meeting was held in Miami between Mr. Dolora, Mr. Gary Alfson of AA., Mr. John Lynch and myself with the purpose of trying to ensure AA's continued travel to Jamaica. At the meeting, negotiations commenced with regard to establishing more flights to Jamaica from AA's major hubs, those being Dallas, Miami, and Chicago. At the conclusion of this meeting, AA agreed to send Mr. Lynch a draft agreement for consideration by the relevant parties. Subsequent to the said meeting, Mr. Lynch and Mr. Lionel Reid, Executive Directors of JAMVAC, handled all future negotiations.*

*In or about early May 2008, Mr. Lynch indicated to me that it would be possible to secure an arrangement with AA which would guarantee a certain number of flights from AA's hubs at Miami, Chicago, and Dallas, however AA required a guarantee in the sum of US\$1,500,000.00 for each hub, totalling US\$4,500,000.00. It should be noted that AA has similar deals with St. Lucia, Antigua, St. Kitts, Bermuda, and Aruba, to which similar guarantees were required. Mr. Lynch further indicated that neither the Jamaica Tourist Board nor JAMVAC, were in a position financially to supply the requisite guarantees and that assistance would be required in securing the same.*

*As a result of this discussion, I wrote a letter dated May 13, 2008 to the Prime Minister, the Honourable Mr. Bruce Golding O.N., indicating the need for the guarantees. The Prime Minister verbally responded to me indicating that I should seek the assistance of the Ministry of Finance. Accordingly, Mr. Lynch wrote to the Honourable Mr. Audley Shaw, Minister of Finance, requesting the said guarantees. By letter dated June 10, 2008, Minister Shaw indicated that the Ministry of Finance could not provide the requisite guarantees. It is unknown as to why the Ministry of Finance did not provide such guarantees.*

*In the early part of July, 2008, I verbally approached the Chairman of the Tourism Enhancement Fund (TEF) and indicated that JAMVAC would be approaching TEF to determine whether it, TEF, was in a position to assist with providing the requisite guarantees, as per TEF's mandate. TEF is funded by a US\$10 assessment fee on ticket of each tourist each tourist [sic] arriving in Jamaica. Thus given the nature of the agreement with AA, TEF would be a direct beneficiary of the said agreements. JAMVAC approached TEF for the funding and subsequently the Board of TEF agreed to provide the requisite guarantees in the form of letters of credit.*

*Sometime thereafter, Mr. Lynch and Mr. Lionel Reid submitted the proposed contracts with AA to the Permanent Secretary of the Ministry of Tourism for the purpose that I seek the approval of Cabinet. The agreements were subsequently executed.”<sup>17</sup>*

Further, the OCG, in its written Requisition, which was dated 2009 July 7, asked Mr. Anthony King, Regional Director, Airline and Tour Operator, JTB, the following question:

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<sup>17</sup> Letter which was dated 2009 July 8, from Minister Edmund Bartlett, in response to the OCG's Requisition.

*“What is the extent of your knowledge of the American Airlines Air-Lift Guarantee Deal? Please provide a comprehensive statement to this question.”<sup>18</sup>*

Mr. Anthony King, in his sworn response to the OCG’s Requisition, which was dated 2009 July 21, indicated that:

*“I was informed by the Chairman and the Director of Tourism John Lynch by a phone call that because of high demand for air seats, (before the economic fallout worldwide, about September of 2008, I believe), that he will be talking to American Airlines about airlift. American Airlines I read, and it was confirmed by the JTB Chairman, was losing millions of dollars because of high price of fuel and was cutting air service to international and domestic destinations and Jamaica was included.*

*What I learned later was American Airlines had proposed to the destinations that were to be affected by the cutback that the destination would have to guarantee the shortfall of a set operational revenue levels of each flight, if the destination wanted American Airlines to fly the route.*

*I did not know that the JTB/JAMVAC or any other Jamaica government agency had entered into an agreement with American Airlines until there was an outcry in the media that JAMVAC had done so and **Mr. Pennicook** of Air Jamaica objected to it.*

*To date I have not seen or read the details of the contract and up to the time of writing this response have not seen the contract.”<sup>19</sup>*

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<sup>18</sup> The OCG’s formal Requisition which was dated 2009 July 7, to Mr. Anthony King, Regional Director, Airline and Tour Operator, JTB.

<sup>19</sup> Letter which was dated 2009 July 21, from Mr. Anthony King, in response to the OCG’s Requisition.

The OCG was also supplied with the following documentation, *inter alia*, with regard to the genesis of the AA/JAMVAC Air Service Agreements:

1. A letter which was dated 2008 May 13, from Minister Edmund Bartlett to the Prime Minister, the Hon. Bruce Golding, as evidence regarding the genesis of the Air Service Agreements. The referenced letter stated, *inter alia*, as follows:

*“Further to discussions this morning regarding the captioned matter, we submit herewith the programme need for American Airlines out of Dallas, Chicago and Miami. Please note also the attachment with request for seat support from European carriers.*

*The request from American Airlines is predicated on a Letter of Credit for US\$4.5 million which may remain unused, but has to be committed. For example, a similar case obtain last year with LTU when only a portion of the funds committed was actually utilized.*

*It is imperative that we sign off on these commitments by the latest Monday, May 19<sup>th</sup>, failure of which we will lose the option of these rotations into our market resulting in horrendous fall out in visitor arrivals for 2008.*

*Our 2008/09 budget allows us to spend approximately US\$2.5 million on seat support. Based on the request outlined in the attached tables for American Airlines and the European carriers, JAMVAC would need an additional US\$4.5 million immediately.”<sup>20</sup>*

2. An email, which was dated 2008 June 4, from Mr. John Lynch, Chairman of the Board, JAMVAC, to the Minister of Finance and the Public Service (MOFPS), the Hon. Audley Shaw.

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<sup>20</sup> Letter which was dated 2008 May 13, from Minister Edmund Bartlett to Prime Minister Bruce Golding.

It must be recalled that in his sworn response to the OCG's Requisition, Mr. Lynch indicated that "...I wrote to the Honourable Mr. Audley Shaw, Minister of Finance, requesting the said guarantees.

The referenced email was provided to the OCG by Mr. John Lynch, in his sworn response to the OCG, and stated as follows:

*"I refer to previous discussions with you concerning the need for additional airlift to satisfy the increased demand for the coming winter season 2008/09. Perhaps you will recall that I had informed you that in order to maintain a 75% hotel room occupancy, we need an additional 120,000 seats, bearing in mind the increased room inventory which comes on stream later this year.*

*As you know, we have been having discussions with American Airlines. These discussions have promise of success. Subject to the Jamaica Tourist Board providing adequate guarantee, American Airlines is prepared to increase their service to Jamaica from three gateways, as follows:*

*Five flights out of Miami*

*Seven flights out of Dallas*

*Five flights out of Chicago*

*This is against the background of reducing service to other Caribbean destinations. **We are in the fortunate position which we find ourselves because we are the first out of the box with a proposal to American airlines.** (OCG Emphasis) However, as a condition precedent to coming into effect of this arrangement of increased service, American Airlines would like to have a guarantee from the Jamaica Tourist Board of US\$1.5 million per gateway.*

*The service is scheduled to come into effect November 2008 and run through April 2009. The preferred guarantee would be by way of bank guarantee, or an irrevocable letter of credit from a recognized financial institution. However, the Jamaica Tourist Board is not in a position to provide such a guarantee, as commercial banks would want to have an asset-backed guarantee from the Board before they would issue such a financial instrument.*

*We therefore believe that, if you would issue to the Jamaica Tourist Board a comfort letter or a letter of commitment for the total amount of US\$4.5 million, the Board would be empowered to issue a letter of commitment to American Airlines in equal amount.*

*It is our firm belief that a call on this letter of commitment is a remote possibility, as the flights, would be monitored by a senior officer of the Board to ensure that no risk is incurred. In the unlikely event of this happening, adjustments would be made to the arrangements so that the risk is not incurred....”<sup>21</sup>*

3. A letter which was dated 2008 June 10, from Minister Audley Shaw, MOFPS, to Minister Edmund Bartlett, MOT. The referenced letter was provided to the OCG by Mr. John Lynch, in his sworn response to the OCG, and was captioned “*Commitment of US\$4.5 million for Airlift/Seat Risk Support to Flights to Jamaica*”. The letter stated as follows:

*“With regards to the captioned subject, I advise that you provide American Airlines with the commitment predicated against your existing Budget.*

*On the understanding that you monitor the programme carefully so as to minimize expenditure on seat support, the Ministry of Finance and the Public Service will*

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<sup>21</sup> An email, which was dated 2008 June 4, from Mr. John Lynch, Chairman, JAMVAC to the Minister of Finance and the Public Service (MOFPS), Hon. Audley Shaw.

*support the seat support request and undertakes to include such additional expenditure in the First Supplementary Estimates 2008/09.*"<sup>22</sup>

4. A second letter, which was dated 2008 June 10, from Minister Audley Shaw, MOFPS, to Minister Edmund Bartlett, MOT. The referenced letter was provided to the OCG by Mr. John Lynch, in his sworn response to the OCG, and was captioned "Commitment of US\$4.5 million for Airlift/Seat Risk Support to Flights to Jamaica".

The letter stated as follows:

*"With regards to the captioned subject, I advise that you provide American Airlines with the commitment predicated against your existing Budget.*

*On the understanding that you monitor the programme carefully so as to minimize expenditure on seat support, the Ministry of Finance and the Public Service will support the seat support request and undertakes to include such additional expenditure in the First Supplementary Estimates subject to the approval of Cabinet and Parliament.*"<sup>23</sup>

5. A letter which was dated 2008 June 12, from Mr. John Lynch, Chairman of JAMVAC, to Mr. Peter Dolara, Senior Vice President of AA (Miami, Caribbean and Latin America), and which was captioned, "Additional Flights from Chicago/Dallas/Miami to Montego Period: November 2008 to November 2009". The referenced letter indicated as follows:

*"I refer to our several discussions regarding the subject at caption and I now write to confirm that the Board of Directors of Jamaica Vacations Limited*

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<sup>22</sup> A letter which was dated 2008 June 10, from Minister Audley Shaw, MOFPS, wrote to Minister Edmund Bartlett, MOT

<sup>23</sup> A letter which was dated 2008 June 10, from Minister Audley Shaw, MOFPS, wrote to Minister Edmund Bartlett, MOT

*(JAMVAC) has approved a proposal to provide American Airlines with their letter of undertaking to pay for the shortfall in net revenues (if any) for additional seats flown out of the gateways mentioned above to Montego Bay amounts not exceeding US\$1.5 Million Dollar (US\$1,500,000.00) per gateway for the period:*

*-Chicago to Montego Bay-5 flights weekly*

*-Dallas to Montego Bay- 7 flights weekly*

*-Miami to Montego Bay-7 flights weekly*

*As you may know Jamaica Vacations Limited is wholly owned by the Government of Jamaica. Accordingly a commitment of this nature requires the approval of the Cabinet. In this regard, I am to inform you that a Submission has been forwarded to the Cabinet and we feel confident that we will have their approval when the Cabinet meets on Monday, 16<sup>th</sup> June 2008. This will enable me to give you final confirmation no later than Tuesday, 17<sup>th</sup> June, 2008....”<sup>24</sup>  
(OCG Emphasis)*

6. The Extract from the Minutes of JAMVAC’s Board Meeting which was held on 2008 June 18, also made mention of the Airlift Agreements. The Minutes stated, *inter alia*, as follows:

*“The Chairman described the current status of the airlines industry as being tantamount to madness. He noted that Continental Airlines has announced 5,000 job cuts with the possibility of another 10,000 jobs to go, together with cities that will be without service.*

*With fuel costs spiraling to US \$130 per barrel, the real costs to airlines could be as much as US\$160- an added US\$30 incurred for the extra fuel refining*

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<sup>24</sup> A letter which was dated 2008 June 12, from Mr. John Lynch, Chairman of JAMVAC, to Mr. Peter Dolara, Senior Vice President of AA (Miami, Caribbean and Latin America).



*processing required by airlines resulting in fuel cost accounting for movements from 18%-39% of an airline costs.*

*Realizing the current trend in the airlines industry, JAMVAC sought to engage American Airlines in dialogue regarding the provision of additional airlift/seats to Jamaica at an exposure of US\$4.5 Million.*

*JAMVAC through the Ministry of Tourism has been able to secure a Letter of Comfort from the Minister of Finance, which in essence agrees to cover the costs of US\$4.5 Million should it be called upon for payment.*

*The purported agreement with American Airlines will see*

- 7 addition flights weekly out of Miami terminating in Montego Bay commencing in November 2008*
- 5 weekly flights out of Chicago- Sunday, Monday, Thursday, Friday & Saturday- commencing in February 2009*
- Daily flights from Dallas-commencing November 2008*

*It was however noted that whilst the Letter of Comfort has held good thus far, AA seemingly preferred security was a Letter of Credit.*

***The Chairman noted it would be of utmost importance that JAMVAC/JTB monitors daily the movements out of the respective gateways.*** (OCG Emphasis)

*Mrs. Dwyer Suggested that with plans to have AA flying out of the Dallas gateway JTB could explore the possibilities of putting some fund...*

***Mrs. Evelyn Smith deflecting back to the AA deal noted that following on the request for support sent via round robin –approval for which she dissented-and the fact that AA was now requesting Letter of Credit, sought clarity on the new scenario.*** (OCG Emphasis)

*It was noted that should the Letter of Credit be the requisite security then this would have to be provided by the government. It was again pointed out that the agreement with AA had been brokered on a Letter of Comfort provided by the Ministry of Finance, it was envisaged that there should not be a problem in settling with AA if called on to pay.*

*Mrs. Smith further indicated that if the decision to go forward with the arrangement with AA was predicated on a Ministry of Finance Comfort Letter, then it should be noted that based on the Minister of Tourism's confirmation that he had received a Letter of Comfort from the Ministry of Finance agreeing to make good the JAMVAC's exposure of US\$4.5 Million, if called upon to pay, the Board granted its approval the proposed agreement between JAMVAC and American Airlines. Again Mrs. Smith noted for the record her disapproval.*

*The Chairman assured the Board that the Comfort Letter was in fact secured as the Permanent Secretary has been involved in the process and that a submission had been made to Cabinet on Monday of this week.*

*Following on request made, the Chairman agreed to circulate a copy of the letter to the Board members.*

*Tabled at the meeting was a letter from the Chairman dated 2008 June 12 to Mr. Peter Dolara, American Airlines, indicating that the proposed agreement was subjected to governmental approval, which he was confident would be obtained at the Cabinet sitting on Monday June 16, 2008 following which he would be in a position to give a commitment on June 17, 2008.*

*It was further noted that with the anticipated 3,000 additional room stock coming on stream it was decisive that quality airlift be secured.*

*Mr. Reid informed that since the airing of the proposed arrangement, much sentiment had been voiced that if any airline should be privy to such support, then it should be Air Jamaica.*

*The meeting took cognizance that much of the dissenting voices to the proposed agreement were as a result of lack of understanding of what was being done, which could be tied back to how the arguments were put forward.*

*The Chairman in response to queries raised as to whether the US\$4.5 Million would be payable to AA whether their flights were full or not, stated that AA was not after the money, but was more fixated on accepted load factors, with their flexibility this can be achieved*

*It was agreed that following on completion of the agreement, a status report would be submitted to the meeting... ”<sup>25</sup>*

7. A Memorandum, dated 2008 July 7, from Mr. Lionel Reid, Executive Director of JAMVAC, which was addressed to the Minister of Tourism, the Hon. Edmund Bartlett, and which was copied to Mrs. Jennifer Griffith, Permanent Secretary, MOT and Mr. John Lynch, Chairman, JAMVAC.

The Memorandum, which gave an account of a meeting which was held with AA, regarding the Air Service Agreements, was submitted to the OCG by Mr. Lionel Reid, in his sworn response to the OCG.

The Memorandum reported that persons present at the meeting were Mr. Peter Dolara, Senior Vice President, AA, Mr. Gary Alfson, representing AA, Mr. John Lynch, Chairman, JAMVAC and Mr. Lionel Reid, Executive Director, JAMVAC. Below is a verbatim extract of the 2008 July 7 Memorandum:

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<sup>25</sup> The Extract from the Minutes of JAMVAC’s Board Meeting which was held on 2008 June 18.

*“The meeting commenced with Mr. Dolara’s brief outline of the Airline’s position for the near future as it relates to Jamaica. He said that as of September 3, 2008, American Airlines will retire several of its aircrafts that are not presently considered to be fuel efficient.*

*As a result many routes now being flown both domestic and international will be discontinued or suffer reduced flight frequencies. The Caribbean will be severely affected as some routes are at best marginal.*

*Jamaica enjoys non-stop service from three (3) American gateways namely: Kennedy Airport, Dallas/Forth Worth and Miami into Montego Bay.*

*At present New York /Montego Bay has daily service using an Air Bus with 267 seats.*

*On this matter, Mr. Dolara pointed out that as of September 3, three of those flights will be removed. The remaining four (4) flights per week will be downgraded to a 737-800 with 188 seats.*

#### **Updates on Flights**

**Dallas** - Commencing September 3, the five (5) flights per week from this gateway will be reduced to zero flights per week. However, because of Jamaica’s initiative one flight per week will be reinstated. This will run to November 2, 2008 by which time it is hoped that the proposed agreement will come into effect, we will then have five (5) flights per week.

**Miami** - Now serves Montego Bay with two (2) daily flights using an Air Bus with 267. As of September 3, the aircraft will be downgraded from 267 to 188 seats. The two (2) daily flights will remain.

**Chicago** - American Airlines does not presently operate non-stop service between Chicago and Montego Bay. From the discussion please note the following:

*Dallas-September 3,- November 1, one flights [sic] per week 148 seats per flight  
November 2-Decemeber 17, 5 flights per week-148 seats for each flight  
December18-April 17, 2009, 7 flights per week 148 seats per flight  
April 18-November 1, 2009, 5 flights per week 148 seats per flight*

**Chicago**- Commencing January 30, 2009, there will be five (5) flights per week using a 737 with 148 seats. By mutual consent, this service can start sooner. This decision has to be made now as they are in the process of repositioning their aircraft....<sup>26</sup>

8. An Addendum to the report on the meeting with AA which was appended to the Memorandum that was dated 2008 July 7, and which was sent from Mr. Lionel Reid, Executive Director of JAMVAC to the Hon. Edmund Bartlett, and copied to Mrs. Jennifer Griffith, Permanent Secretary in the MOT and Mr. John Lynch, Chairman of JAMVAC.

This document, which was submitted to the OCG by Mr. Lionel Reid, in his sworn response to the OCG, provided a justification for entering into the Air Service Agreements. The document indicated that:

**“The reason for identifying American Airlines for providing us with additional airlift at this time is because of their coast to coast deep penetration into the American Markets. Also because of their ability to connect with international flights from South America, United Kingdom, the Far East, and Continental**

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<sup>26</sup> Memorandum dated 2008 July 7, from Minister of Tourism, Edmund Bartlett to Lionel Reid, Executive Director of JAMVAC copied to Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism and Mr. John Lynch, Chairman, JAMVAC.

*Europe. They are perhaps our best hope of attracting attention from some of our emerging markets. They for example have a flight from Moscow to Chicago. This could be an opening into that market. (OCG) Emphasis)*

*We understand that over Twenty Million (20) passengers pass through their Miami hub in 2007 and roughly Forty Million (40) came through their Dallas hub. They have enormous feed into these hubs from behind the gateways that will connect to their flights to Montego Bay.*

*To benefit from this extensive market reach Jamaica should do joint promotions with the airline while increasing our cable advertising in those areas that will feed into the hubs.*

*In this regard, we are in discussion with the Hotel Sector about a Barter Programme which would see us bartering empty rooms for advertising...’’<sup>27</sup>*

9. A letter, dated 2008 July 7, from Mr. John Lynch, Chairman of JAMVAC, which was written to Mr. Peter Dolara, Senior Vice President, AA, and which was entitled “*Re: Air Service Agreement Dallas/Forth Worth-MBJ-Chicago-MBJ-Miami-MBJ*”. The referenced letter indicated, *inter alia*, that:

*“Further to our several discussions regarding the above, I write to confirm that the arrangements contained in the Contracts have been approved. The mechanism for establishing the required Letters of Credit is now being worked out with our Bankers and we confidently expect to have them in place within the next fourteen (14) days. Until then I ask for your indulgence.*

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<sup>27</sup> An Addendum to the Memorandum dated 2008 July 7, which was sent from Lionel Reid, Executive Director of JAMVAC to Hon. Edmund Bartlett, and copied to Mrs. Jennifer Griffith, Permanent Secretary, MOT and Mr. John Lynch, Chairman of JAMVAC.

*I thank you for taking the time meet with Mr. Lionel Reid, Executive Director of Jamaica Vacations Limited and myself when we visited your offices last Thursday. Without your help and understanding these arrangements would not have been possible. For your constant support of the Caribbean in general and Jamaica in particular you have earned our eternal gratitude and respect.”<sup>28</sup>*

10. A letter which was dated 2008 July 17, from the Minister of Tourism, the Hon. Edmund Bartlett to the Minister of Finance and the Public Service, the Hon. Audley Shaw, which stated, *inter alia*, as follows:

*“Over the past weeks, The Ministry of Tourism has been working along with JAMVAC in pursuing discussions with a number of airline representatives with a view to increasing airlift into Jamaica from strategic gateways in the United States. The primary objectives are:*

- 1. To support Jamaica’s “Drive for five-five million visitors in five years”*
- 2. To fill the additional rooms that have been introduced into Jamaica as a result of recent investments in the tourism sector.*
- 3. To militate against the potential fall out in air seat availability as a result of a downturn in the airline industry.*

*American Airlines (AA) has agreed to add additional flights from three gateways in North America namely Chicago Ohare, Dallas Forth Worth and Miami. This could result in an annual increase in excess of one hundred thousand visitor arrivals. The resulting increase in revenue to TEF is anticipated at approximately US\$1M.*

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<sup>28</sup> A letter which was dated 2008 July 7, from Mr. John Lynch, Chairman, JAMVAC to Mr. Peter Dolara, AA.

*The airline however has stipulated a minimum revenue requirement and has insisted on the provision of letters of credit to compensate for any loss of income. In order to establish the “Air Service Agreement” we are required to provide three letters of credit, each in the amount of US\$1.5 M on the following conditions:*

***Instrument:*** Irrevocable and unconditional letter of credit  
***Amount:*** US\$4.5M (3×\$1.5M)  
***Tenure:*** July 22, 2008-December 18, 2009  
***Beneficiary:*** American Airlines Incorporated  
***Issuing Bank:*** National Commercial Bank Ltd.  
***Collateral:*** Hypothecated G.O.J. Repurchase Agreement

***The Jamaica Tourist Board will embark on a comprehensive marketing programme to support the introduction of these new flights. Marketing activities will take place in areas surrounding the gateways as well as other source markets which link into these hubs. (OCG Emphasis)***

*We are requesting approval from the Ministry of Finance and the Public Service for funds to be guaranteed through the Tourism Enhancement Fund and have enclosed a copy of the proposed agreement as well as the required format of the letter of credit for your perusal. We hope to finalize the agreement by the latest Tuesday, July 22, 2008 and would therefore appreciate you giving this matter your urgent attention.”<sup>29</sup>*

11. A letter which was dated 2008 July 18, that was sent via email from Mr. Ian Neita, Executive Director, TEF, to the Board Members of the TEF. The letter stated, *inter alia*, that:

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<sup>29</sup> Letter dated 2008 July 17, from the Minister of Tourism, Hon. Edmund Bartlett to Minister of Finance and the Public Service, Audley Shaw.



*“The Minister has been having discussions with American Airlines (AA) which has resulted in an agreement by AA to add additional flights from three gateways in North America namely: Chicago O Hare, Dallas, Fort Worth and Miami. This could result in an annual increase of 100,000 visitors from all over the world connecting through these three huge gateways. The resulting increase in revenue to TEF would be US\$1m. In order to establish this Air Service Agreement letters of credit are necessary.”*<sup>30</sup>

12. An extract from the draft Minutes of the Project Sub Committee Meeting of the TEF Board of Directors, which was held on 2008 July 23. Same was provided to the OCG by Mrs. Jennifer Griffith, in her sworn response to the OCG, which was dated 2009 June 18. The referenced Minutes had the caption: *“Guarantee for the Agreement between JAMVAC and American Airlines”*, and indicated, *inter alia*, as follows:

*“Mr. Neita made reference to the JAMVAC/American Airlines Air Service Agreement that was forwarded to the Committee prior to the meeting. He noted that a guarantee was required from JAMVAC by American Airlines, however, due to financial constraints, TEF was asked to provide the guarantee. He cited that there was support for the initiative to secure additional airlift in to [sic] island, however, he stated that the Committee should be cognizant of the fact that if the guarantee is called upon at the end of the Agreement, it would represent a significant portion of the Fund. He further recommended to the Committee that in order to militate against another request being made of TEF, a letter should be written to JAMVAC advising them that TEF could not afford to stand another guarantee as the Fund would be unable to sustain such a request...”*<sup>31</sup>

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<sup>30</sup> Letter which was dated 2008 July 18, that was sent via an email from Mr. Ian Neita, Executive Director, TEF to the Board Members of the TEF.

<sup>31</sup> An extract from the draft Minutes of the Project Sub Committee Meeting, which was held on 2008 July 23

13. In the draft Minutes of the TEF Board Meeting, which was dated 2008 July 23, that was provided to the OCG by Mr. Dyer, in his sworn response to the OCG, it was indicated that Mr. Neita "...cited that the JAMVAC/American Airlines Agreement originated from the fact that it was felt that there is a shortage of airlift in to the island what with [sic] the additional hotels rooms being constructed. He continued by stating that it was important for the Board members to understand the risk involved in putting forward the guarantee for this agreement....**The Board agreed to approve the guarantee pending a marketing plan being presented and an internal audit system set up to monitor the flights on a daily basis.** (OCG Emphasis) Mrs. McLaren enquired whether the proper procurement procedures were followed with respect to this Agreement and opined that, that should have definitely been done. The Board agreed that TEF would provide the guarantee for the Agreement. Of note, two Directors abstained from voting, Mr. Tomlin Scarlett and Mrs. Pamella McLaren."<sup>32</sup>

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<sup>32</sup> An extract from the draft Minutes of the TEF Board Meeting, which was held on 2008 July 23.

## American Airline's Account of the Airlift Guarantee Deal

By way of Letters of Invitation, which were dated 2009 June 1, the OCG wrote to Mr. Peter Dolara, Senior Vice President, Miami, Caribbean and Latin America, and Mr. Walter J. Aue, Vice President, Capacity and Planning, AA, indicating, *inter alia*, as follows:

*“As we believe that your assistance and cooperation can contribute to the successful conduct of this Investigation, and in recognition of the fact that American Airlines, Inc. is one of the key players in the Air Service Agreements, we have deemed it prudent, and a fundamental principle of natural justice, to extend an invitation to you to provide the OCG with a formal statement and/or information in regard to the circumstances surrounding the consummation of the Air Service Agreements.”*<sup>33</sup>

In response to the OCG's Letter of Invitation, Mr. Gary Alfson, Specialist Marketing Development, AA., wrote to the OCG, by way of a letter which was dated 2009 July 8, advising, *inter alia*, that:

**“American Airlines was approached last year, as early as April, by Lionel Reid, the Executive Director of Jamaica Vacations Limited, and John Lynch, Director of Tourism and Chairman of the Jamaica Tourist Board, concerning the possibility of American Airlines adding additional service to Jamaica. (OCG Emphasis) Mr. Reid and Mr. Lynch were concerned that American Airlines would be reducing service to Jamaica because of weak demand. They were also concerned that decreased air service to Jamaica would adversely affect the tourism industry in Jamaica. Mr. Reid and Mr. Lynch expressed the desire of the tourism industry in Jamaica to keep sufficient air service to minimize any adverse**

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<sup>33</sup> OCG's Letter of Invitation, which was dated 2009 June 1, to AA.

*impact on the industry and those employed directly or indirectly by the industry in Jamaica.*

*Mr. Reid and Mr. Lynch wanted American Airlines to add new service to Jamaica from Chicago O'Hare International Airport (ORD), continue service from Dallas/Fort Worth International Airport (DFW), and add an additional flight from Miami International Airport (MIA). After protracted discussions with Mr. Reid and Mr. Lynch, American Airlines agreed to add service from ORD, continue service from DFW, and add one additional flight from MIA. I was the principal negotiator on behalf of American Airlines, and was involved in the preparation of the Agreements. Most, if not all, of my contacts on the Jamaica Vacations side, were with Mr. Reid, who I assume was the principal negotiator for Jamaica Vacations.*

**As you know, the negotiations resulted in three separate agreements between American Airlines and Jamaica Vacations.** *(OCG Emphasis) These types of agreements are not unusual in the airline industry or in the Caribbean. While the exact terms of the agreements vary, American Airlines has similar agreements with several other countries in the area.*

*Since the Agreements became effective, I have stayed in contact with Mr. Reid and Mr. Lynch and I have given them bi-weekly updates for all three routes. Because the bookings were poor early on for the new service from ORD and the service from DFW, American, at the request of Mr. Reid and Mr. Lynch, agreed to amend both of those Agreements. The Amendment to the ORD Air Service Agreement changed the proposed flight schedule from five weekly flights from January 31, 2009 to January 30, 2010, to twice weekly service from January 31, 2009 to April 6, 2009. American Airlines also agreed to amend the DFW Air Service Agreement. Although it was not obligated to agree to any amendments, American Airlines agreed to the amendments with no penalties or additional charges. Because of the Amendment to the ORD Air Service Agreement, that*

*Agreement terminated on April 6, 2009 with a revenue excess instead of a possible revenue shortfall had the Agreement continued through February 28, 2010, the original termination date.*

*In addition, the three original Agreements were separate agreements. Consequently, a revenue excess from one agreement would not offset a revenue shortfall from a different agreement. American Airlines also volunteered to combine all three agreements in calculating the revenue excess or shortfall. The result is that Jamaica Vacations will be able to offset any moneys owing American Airlines under one of the agreements using the revenue excess from another agreement. For example, the revenue excess from the ORD Agreement is now available to offset any revenue shortfall from the DFW or MIA Agreements. This was not an option under the original Agreements and should lessen the chances of a revenue shortfall.”<sup>34</sup>*

Based upon the foregoing, the OCG found that the Agreements were considered by JAMVAC after it was found that AA was planning to discontinue several scheduled flights to Jamaica and that there was a perceived need for additional airlift to satisfy the demand which was created by the increase in room stock.

It was also noted by representatives of JAMVAC that AA is one of the largest carriers in the Caribbean and it covers several routes around the world. As such, AA’s extensive access to gateways worldwide was the main reason that it was approached as a suitable carrier for the Airlift Guarantee Agreements.

Further, it was also noted that other countries were also forming similar agreements with AA and, as such, it was imperative that Jamaica initiated similar agreements to save the tourism industry from the possible effects of flight reductions.

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<sup>34</sup> Letter to the OCG which was dated 2009 July 8, from Mr. Gary Alfson, Specialist, Marketing Development, American Airlines, Inc.

It should be noted that the decision to approve the funds for the Air Service Agreements was made at the TEF Board meeting which was held on 2008 July 23. Of import is the fact that two Directors recused themselves from the voting process and one of the said Directors raised concerns about whether the proper procurement procedures were followed.

Based upon the arguments which have been put forward by the members of the TEF and JAMVAC who were involved in the referenced Air-lift Guarantee Agreements, the OCG found that it was believed that there were many potential benefits to be derived from such a 'Deal' as it could (a) result in an increase in the number of visitors to the island, and (b) possibly prevent the elimination of a number of jobs especially in the Tourism Industry.

Further, it should be noted that Mrs. Jennifer Griffith, Permanent Secretary, MOT, in her response to the OCG's Requisition that was dated 2008 September 17, indicated that this deal was initiated after "...JAMVAC in pursuit of its primary objectives and core function accepted a verbal, unsolicited proposal from American Airlines to provide additional service from three (3) gateways in the United States of America." (OCG Emphasis)

However, Mrs. Griffith's assertion is contrary to the accounts which were given by other respondents, as all the other respondents indicated that JAMVAC approached AA regarding the referenced Agreements.

In regard to the noted discrepancy, it is instructive to note that the OCG, in its Requisition, which was dated 2009 May 27, asked Mrs. Griffith the following question:

*"The Ministry of Tourism, in an Executive Summary of the Genesis of the Air Service Agreements between Jamaica Vacations and American Airlines, which was submitted to the OCG, under cover of letter dated September 17, 2008, asserted, inter alia, that, "...JAMVAC in pursuit of its primary objectives and core function accepted a verbal,*

*unsolicited proposal from American Airlines to provide additional service from three (3) gateways in the United States of America.”*

*Please answer the following questions and, where possible, provide documentary evidence in support of any assertions made.*

- i. Please indicate the date on which the verbal, unsolicited proposal was received from American Airlines;*
- ii. Please state the name(s) of the representative(s) of American Airlines who presented the verbal unsolicited proposal;*
- iii. Please state the name(s) of the Government of Jamaica representative(s) to whom the verbal, unsolicited proposal was presented;*
- iv. Please provide full particulars of the circumstances, inclusive of location, under which the verbal, unsolicited proposal was initially presented by and to all parties;*
- v. Was the unsolicited proposal ever reduced to writing? If yes, please indicate the date on which this was done and provide a copy of same.”<sup>35</sup>*

In her sworn response to the OCG’s Requisition, which was dated 2009 June 18, Mrs. Griffith stated as follows:

*“I do not know. I was advised by Mr. John Lynch, Chairman of JAMVAC that this was a verbal, unsolicited proposal from American Airlines.*

- ii. I do not know*
- iii. Mr. Lynch advised me of the proposal.*
- iv. I do not know*
- v. I do not know”<sup>36</sup>*

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<sup>35</sup> OCG’s Requisition which was dated 2009 May 27 to Mrs. Jennifer Griffith, Permanent Secretary, MOT.

The statement from Mrs. Griffith contradicts that which was provided by Mr. John Lynch is his sworn statement to the OCG which was dated 2009 July 16. Similarly, Mr. Gary Alfson, Specialist Marketing Development, AA, has also asserted that AA was in fact approached by Mr. Lynch and Mr. Lionel Reid.

In point of fact, Mr. John Lynch, in his sworn response to the OCG, which was dated 2009 July 16, indicated that *“There was no verbal unsolicited proposal from AA. I approached AA...”*<sup>37</sup>

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<sup>36</sup> Letter which was dated 2009 June 18, from Mrs. Jennifer Griffith, in Response to the OCG’s Requisition.

<sup>37</sup> Letter from Mr. John Lynch, which was dated 2009 July 16, in response to the OCG’s Requisition.



## The Attorney General's Comments on the Air Service Agreements

It is instructive to note that before the Air Service Agreements were signed, draft copies of the Agreements were submitted to JAMVAC regarding the proposed arrangements. These Agreements were subsequently sent to the Attorney General's Chambers for review.

In a letter which was dated 2008 July 9, that was addressed to Senator the Honourable Dorothy C. Lightbourne, Minister of Justice and Attorney General, from Mr. Lionel Reid, Executive Director, JAMVAC, it was indicated that:

*“Jamaica Vacations Limited (JAMVAC) has been charged by the Minister of Tourism with the responsibility of ensuring that there are adequate air seats to satisfy the needs of existing and future hotels. In pursuit of this objective JamVac is seeking to enter into contractual arrangements with various airlines who will provide charter as well as scheduled air service into Montego Bay.*

*One such negotiated arrangement is with American Airlines to provide additional service from Chicago, Dallas/Fort Worth and Miami. The enclosed Contracts recite the terms and conditions under which AA will provide the service.*

*We should appreciate if you would let us have your comments as early as possible. They have given us a time window of fourteen (14) days from the 8<sup>th</sup> of July in which to sign and return these Contracts. Kindly therefore treat the matter as one of great urgency as we can not afford to lose this opportunity.”<sup>38</sup>*

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<sup>38</sup> Letter which was dated 2008 July 9, that was addressed to Senator Honourable Dorothy C. Lightbourne, Minister of Justice and Attorney General, from Mr. Lionel Reid, Executive Director, JAMVAC. (See Appendix III)

In response to this letter, the Assistant Attorney General, Ms. Chenee Riley, in a letter which was dated 2008 July 22, wrote to JAMVAC outlining her comments regarding the proposed agreements.

In regard to the comments from the Attorney General's Chambers, Mr. Lionel Reid submitted a letter which was dated 2008 July 24, that was addressed to Mr. John Lynch, regarding the foregoing comments from the Attorney General on the Air Service Agreements.

The referenced letter indicated as follows:

*"I am forwarding to you a copy of the comments received from the Attorney General's Chambers on the above captioned. Based on these comments I contacted Mr. Gary Alfson of American Airlines, who arranged a conference call with Ms. Karen Zapata of their Dallas Headquarters.*

*My primary concern was the question of meeting a timeline of tomorrow's date (Friday, July 25) for presentation to them of Letters of Credit totaling Four Million Five Hundred Thousand Dollars (US\$4.5M), as well as the requirements to automatically renew the Instruments for a further one year. After pointing out the cost implications to JamVac, they agreed to look at any modification we wish to make to the wording of the Letter of Credit. They also agreed not to enforce the time line of July 25 and that they will accept the Letter of Credits from our Bank. You will note that the Contracts for Dallas and Miami require the Letter of Credits to be presented on or before November 2, 2008.*

*The Attorney General's Department has recommended that Clause Three (3) of the Letter of Credit be deleted, and the last sentence be amended to end with "expires on December 18, 2009."*

*Mr. Alfson insists that they will not entertain any discussion on the Contract. However, I may send him the comments. In as much as you are mainly responsible for the coming into being of this agreement, I think you are the best person to try to get American Airlines to take on board some of the recommendations of our Attorney General. Please note that these recommendations do not materially affect the commercial arrangements of the agreements, so let us discuss them before you contact American Airlines.”*

## Monitoring of Flights

The Hon. Audley Shaw, Minister of Finance and the Public Service, MOFPS, by way of a letter which was dated 2008 June 10, that was addressed to the Hon. Edmund Bartlett, Minister of Tourism (MOT), and which was captioned “*Commitment of US\$4.5 million for Airlift/Seat Risk Support on Flights to Jamaica*”, stated that “*With regards to the captioned subject, I advise that you provide American Airlines with the commitment predicted against your existing Budget.*”

*On the understanding that you monitor the programme carefully so as to minimize expenditure on seat support, the Ministry of Finance and the Public Service will support the seat support request and undertakes to include such additional expenditure in the first Supplementary Estimates 2008/09*<sup>39</sup> **(OCG Emphasis)**

The OCG found that the TEF Board of Directors supported the suggestion for the monitoring of flights, pursuant to the Airlift Agreement. This was highlighted in the extract from the minutes of the JAMVAC Board Meeting, which was held on 2008 June 18, in which it was stated that “*The Chairman noted that it would be of utmost importance that JAMVAC/JTB monitors daily the movements out of the respective gateways.*”<sup>40</sup>

Additionally, it was recorded in the Minutes of the TEF Board meeting, which was held on 2008 July 23, that “*Mr. Basil Smith advised the Board that Tony King of the JTB would be monitoring the flights in the interest of JAMVAC.*”<sup>41</sup>

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<sup>39</sup> Letter dated 2008 June 10, from Hon. Edmund Bartlett, Minister of Tourism to the Hon. Audley Shaw, Minister of Finance and the Public Service.

<sup>40</sup> Extract from Minutes of JAMVAC’s Board Meeting which was held on 2008 June 18.

<sup>41</sup> Extract from the Minutes of the TEF Board meeting which was held on 2008 July 23.

In this regard, the OCG found that by way of a letter, which was dated 2008 October 7, Mr. Lionel Reid informed Mr. Ian Neita that *“Mr. Anthony King, Regional Manager of the JTB will monitor the flights from the three (3) gateways. Every two weeks, he will contact Mr. Gary Alfson of American Airlines for the load factor on each flight. The information he receives will be sent in written form to this office and we will send you a copy of the information as soon as received.*

*Rest assured that every effort will be made to achieve the objectives of the arrangements.”*<sup>42</sup>

Having regard to the foregoing, the OCG found that JAMVAC/TEF sought to put mechanisms in place in order to monitor the load factor on each flight out of the respective gateways.

In point of fact, Mr. Anthony King, in his sworn response to the OCG’s Requisition, which was dated 2009 July 21, stated that:

*“I monitor the seat utilization to measure load factor performance of US carriers to Jamaica and when provided monitor advance booking pattern to analyze pace of bookings to forecast trends and report to my Deputy Director Sales **Donnie Dawson** and the Director of Tourism **John Lynch**. As a result I was asked to provide the passenger seat utilization on American Airlines flights that JAMVAC had guaranteed to JAMVAC’s Chairman **Lionel Reid**, on a monthly basis and presently do. My monitoring of the American Airline flights does not extend beyond this measurement and I was not required to provide any other information on these flights, particularly regarding revenue performance.”*<sup>43</sup>

Mr. King also provided the OCG with a sample of the Monitoring Report on the flights which he is required to monitor. According to Mr. King, the referenced Report details (a)

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<sup>42</sup> Letter dated 2008 October 7, from Mr. Lionel Reid to Mr. Ian Neita

<sup>43</sup> Letter from Mr. Anthony King in response to the OCG’s Requisition which was dated 2009 July 21.

capacity of the aircraft; (b) daily seats occupied for the flight for the month; and (c) a total of the seats and the percentage utilization referred to as the load factor percentage. The referenced Report detailed information in regard to the period of 2008 November to December, and 2009 January to May.

The table below indicates the percentage of seats which were occupied monthly for the months of 2008 November to December and 2009 January to May. This information was extracted from the Monitoring reports which were submitted to the OCG by Mr. King.

**Table showing the percentage of seats which were occupied monthly for the months of 2008 November to December and 2009 January to May.**

<b>Month</b>	<b>Flight</b>	<b>Monthly load factor percentage</b>
2008 November	Miami	75%
2008 November	Dallas Fort Worth	73%
2008 December	Miami	84%
2008 December	Dallas Fort Worth	78%
2009 January	Miami	69%
2009 January	Dallas Fort Worth	58%
2009 February	Miami	82%
2009 February	Dallas Fort Worth	70%
2009 February	Chicago O'Hare	70%
2009 March	Miami	70%
2009 March	Dallas Fort Worth	76%
2009 March	Chicago O'Hare	88%
2009 April	Miami	95%
2009 April	Dallas Fort Worth	82%
2009 April	Chicago O'Hare	83%
2009 May	Miami	99%
2009 May	Dallas Fort Worth	97%
2009 May	Chicago O'Hare	0%

## The Marketing Strategy to Support the Airlift Agreement

In an extract from the Draft Minutes of the Project Sub Committee of the TEF Board of Directors, which was held on 2008 July 23, Mr. Neita is recorded to have posited that *“...as far as he knew there is no marketing support for the routes outlined in the contract, however, JAMVAC would be seeking an additional US\$3M from the government to assist with their marketing efforts.”*<sup>44</sup>

It must also be noted that the extract from the Minutes of the TEF Board of Directors, which was held on 2008 July 23, stated that *“The consensus of the Board was that a guarantee of this nature must be supported by a detailed marketing plan, if not, the results could be fatal.”*<sup>45</sup>

In the OCG Requisitions, which were dated 2009 May 27, to Mr. Lionel Reid, Executive Director, JAMVAC, Mr. John Lynch, Chairman JAMVAC, Mrs. Jennifer Griffith, Permanent Secretary, MOT and Minister Edmund Bartlett, Minister of Tourism, MOT, the following question was asked:

*“An extract from the Minutes of the Tourism Enhancement Fund Projects Sub-Committee held on July 23, 2008 stated, inter alia, that “Mr. Neita informed the Committee that as far as he knew there is no marketing support for the routes outlined in the contract, however, JAMVAC would be seeking an addition US\$3M from the government to assist with their marketing efforts.” Please detail the marketing strategy(ies) and/or marketing promotion(s) which have been undertaken, to date, to complement the American Airlines Air-Lift Guarantee*

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<sup>44</sup> Extract from the Draft Minutes of the Project Sub Committee of the TEF Board of Directors, which was held on 2008 July 23.

<sup>45</sup> Extract from the Draft Minutes of the Project Sub Committee of the TEF Board of Directors, which was held on 2008 July 23.

*Deal in an effort to mitigate against any shortfall in projected visitor arrivals/ load factor required to meet the minimum revenue requirements.”<sup>46</sup>*

In his sworn response to the OCG’s Requisition, which was dated 2009 July 16, Mr. Reid indicated that *“A marketing strategy report entitled “Six Month Public Relations Activities for the Jamaica Tourist Board; Promoting Jamaica in Key American Airline Markets, October 2008-March 2009” was prepared detailing the promotions that would be undertaken by the Jamaica Tourist Board.”<sup>47</sup>*

In support of this statement, Mr. Reid also submitted the plan which was entitled: *“Six Month Public Relations Activities for the Jamaica Tourist Board- Promoting Jamaica in Key American Airline Markets, October 2008-March 2009, Submitted by: Ruder Finn”*.

This plan outlined activities which were scheduled to take place during the year, and which would be geared towards promoting tourism in Jamaica. It also indicated events in which the JTB would be promoting Jamaica within the United States of America and other countries. Featured activities included television, radio and magazine promotions.

Mr. John Lynch, in his sworn response to the OCG’s Requisition, which was dated 2009 July 16, indicated that *“A marketing strategy report entitled “Six Month Public Relations Activities for the Jamaica Tourist Board; Promoting Jamaica in Key American Airline Markets, October 2008-March 2009” was prepared detailing the promotions that would be undertaken by the Jamaica Tourist Board. **These promotions have been fully implemented.**”<sup>48</sup> (OCG Emphasis)*

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<sup>46</sup> OCG Requisitions, which were dated 2009 May 27, to Mr. Lionel Reid, Executive Director, JAMVAC, Mr. John Lynch, Chairman JAMVAC, Mrs. Jennifer Griffith, Permanent Secretary, MOT and Minister Edmund Bartlett, Minister of Tourism, MOT.

<sup>47</sup> Letter from Mr. Lionel Reid which was dated 2009 July 16, in response to the OCG’s Requisition.

<sup>48</sup> Letter which was dated 2009 June 16, from Mr. John Lynch, in response to the OCG’s Requisition.



Minister Edmund Bartlett, in his sworn response to the OCG's Requisition, which was dated 2009 July 8, indicated that *"This question should best be referred to the Jamaica Tourist Board and Jamaica Vacations Limited as they have detailed information as to the request sought."*<sup>49</sup>

Mrs. Griffith, in her sworn response to the OCG's Requisition, which was dated 2009 June 18, indicated that *"I do not have details of the marketing strategy(ies) promotion(s) that have been undertaken to date to complement the AA Agreement, but I have seen the invoices and supporting documentation from the Advertising Agency..."*<sup>50</sup>

The OCG was also presented with a Media Plan Recommendation which was dated 2008 October 28, for Draft FCB. The Draft Media Strategy was developed for the 2009 period. The stated strategy of the plan was to maximize Jamaica's presence in the first Quarter of 2009 by using targeted cable to build nationwide reach for JTB messaging. This was to be achieved by using Spot TV to bolster JTB's presence in its most important markets, namely New York and South Florida.<sup>51</sup>

Several invoices for Spot TV media coverage as well as National Media Coverage were also submitted to the OCG as evidence to indicate that there were marketing strategies in place which were geared towards attracting more visitors to the island. This information is detailed in the Table overleaf.

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<sup>49</sup> Letter which was dated 2009 July 8, from Minister Edmund Bartlett in response to the OCG's Requisition.

<sup>50</sup> Letter which was dated 2009 June 18, from Mrs. Jennifer Griffith in response to the OCG's Requisition.

<sup>51</sup> 2008 October 28, Draft FCB Jamaica Q1 2009 Media Plan Recommendation

**List of Invoices for Spot and National Media Coverage**

<b>Date of Invoice</b>	<b>Due Date</b>	<b>Type of Media Coverage</b>	<b>Total Amount on Invoice US\$</b>
2009 February 25	2009 March 27	Spot TV Media Billing	191,589.97
2009 February 25	2009 March 27	National Media Billing	930,397.34
2009 March 25	2009 April 24	National Media Billing	663,352.94
2009 March 25	2009 April 24	Spot TV Media Billing	78,676.77

The OCG found that the payments for the media coverage were made via Citibank 111 Wall Street, New York.<sup>52</sup>

Further, the OCG found that based upon the information that was presented there was a marketing strategy for 2009. In line with the said marketing strategy, several payments were made for marketing activities.

However, based upon the OCG's review of the documentation there were no marketing strategies detailed specifically for Dallas and Chicago. The areas which were mentioned in the document were New York and Miami. It should be noted that the document only mentioned that the marketing strategies would take place in the areas surrounding the gateways.

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<sup>52</sup> 2008 October 28, Draft FCB Jamaica Q1 2009 Media Plan Recommendation.

## **Were there breaches of the Government’s Procurement Procedures?**

On 2008 July 23, the Board of TEF held a meeting regarding the Airlift Agreement. In an extract from the Minutes of the TEF Board meeting of 2008 July 23 it was indicated that *“The board agreed to approve the guarantee pending a marketing plan being presented and an internal audit system set up to monitor the flights on a daily basis. Mrs. McLaren enquired whether the proper procurement procedures were followed with respect to this Agreement and opined that, that should have definitely been done. The Board agreed that TEF would provide the guarantee for the agreement. Of note, two Directors abstained from voting, Mr. Tomlin Scarlet and Mrs. Pamella McLaren.”*<sup>53</sup>

Additionally, Circular No. 34 that was dated 2009 September 22, which was circulated by the Public Expenditure Policy Coordination Division of the Ministry of Finance and the Public Service, and which was captioned *Re: Amendments to Procurement Procedures for Commercial Entities* indicated that for the Jamaica Tourist Board & Jamaica Vacations Ltd, *“The following activities are exempt from coverage under the procurement rules and guidelines and these activities will be undertaken according to standard industry practice.*

- i. Co-sponsorship arrangements;*
- ii. Trade and travel road shows;*
- iii. Supplies of goods and services to overseas offices of the JTB; and*
- iv. Co-operative advertising.”*<sup>54</sup>

The referenced Circular was submitted to the OCG by Mrs. Jennifer Griffith, in her sworn response to the OCG’s Requisition, which was dated 2009 June 18, at which time she indicated that *“Having made the initial submission to the OCG everything was subsequently put on hold until we were in receipt of Ministry of Finance and the Public*

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<sup>53</sup> Extract from the TEF Board meeting of 2008 July 23. (See Appendix III)

<sup>54</sup> Circular No. 34 which was dated 2009 September 22, which was circulated by the Public Expenditure Policy Coordination Division of the Ministry of Finance. (See Appendix III)

*Service Circular #34 dated September 22, 2008...which outlined entities (including JAMVAC) which were granted partial exemption from the standard procurement procedures. We also received a letter from the Ministry of Finance and the Public Service to Mr. Lionel Reid (dated October 14, 2008) which concluded that the arrangement with American Airlines was not a procurement contract..."*<sup>55</sup>

It is also evident that JAMVAC sought guidance from the Ministry of Finance and the Public Service regarding the Air-lift Agreements. According to a letter which was dated 2008 October 14, from Mrs. Shirley Gayle Sinclair, writing on behalf of the Financial Secretary, in the Ministry of Finance and the Public Service, to Mr. Lionel Reid, Executive Director of JAMVAC, it was articulated that:

*"The agreements with AA would not fit within the definition of government procurement which I should point out is an internationally accepted definition. No good or service is being supplied to the government or any of its agencies. The service is being provided directly to the passengers who will stand the cost of their travel.*

*The Contractor General's Act for its purposes, outlines a definition of government contract. However, not all government contracts qualify as procurement contracts i.e., a contract formed out of a procurement process.*

*The Contractor General is mandated to monitor the award of contracts. However the requirement to comply with the procurement procedures can only be insisted upon where the action by the entity qualifies as 'procurement'*

*Government in its role as business facilitator will negotiate various agreements to create conditions conducive to the growth and development of various sectors of the economy.*

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<sup>55</sup> Mrs. Jennifer Griffith's Response to the OCG's Requisition which was dated 2009 June 18.

*The fact that government has made this arrangement with AA and has given an undertaking to compensate AA for any shortfall in ticket revenue does not make the agreement a procurement contract.”<sup>56</sup>*

An internal Memorandum which was dated 2008 December 1, from Ms. Chenee Riley, Assistant Attorney General, to Senator Dorothy C. Lightbourne, Q.C., Minister of Justice, and which was copied to Mr. Douglas Leys, Q.C., Solicitor General, also supported the notion that the Airlift Guarantee would not qualify as a procurement.

The referenced internal Memorandum from the Attorney General’s Chambers was conveyed to Ambassador Douglas Saunders, Cabinet Secretary, under cover of letter which was dated 2009 June 3, under the signature of Ms. Dorothy C. Lightbourne, Minister of Justice and Attorney General. The referenced letter indicated that:

*“The Attorney General’s Chambers has reviewed its earlier advice and enclosed herewith is revised advice of the Chambers that the procurement procedures do not apply to the contract between JAMVAC and American Airlines Inc, and further that JAMVAC is not bound to follow any specific procedures in connections with the award of the contract to American Airlines.”<sup>57</sup>*

In the referenced Memorandum, Ms. Riley stated that *“I revisited the issues raised and closely examined the contents of the National Contracts Commission Government Procurement Procedures Handbook (the “Handbook”).*

*Section 1.2 of the Handbook expressly restricts its scope and application to procurement of goods, services and works.*

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<sup>56</sup> Letter dated October 14, 2008 from Shirley Gayle Sinclair, Financial Secretary from the Ministry of Finance and Planning to Mr. Lionel Reid Executive Director of JAMVAC.

<sup>57</sup> Letter dated 2009 June 3 from the Attorney General to Ambassador Douglas Saunders.

***1.2 The Handbook applies to all procurement carried out by procuring entities as defined in Section 1.4 “Definitions”. Procuring entities shall, in carrying out procurement activities, follow the procedures as set out herein.***

*The handbook further defines procurement as the acquisition of goods, services and works by an entity for use by that entity. Section 1.4 defines “Public Sector Procurements” as:*

***Acquisition of goods, services or construction works, by any method, by or on behalf of procuring entities for their own use.***

*The contracts between Jamaica Vacations Limited (“JamVac”) and American Airlines Inc. (“AA”) are government contracts, as defined in the Contractor General Act, and are therefore subject to review and oversight by the National Contracts Commission (the “NCC”). Upon review of my earlier opinion in conjunction with the restrictive language of the Handbook I note however that the procedures outlined in the Handbook did not contemplate the type of contracts entered into between JamVac and AA.*

*As the services to be provided by American Airlines Inc. under the three agreements will not be used by Jamaica Vacations Limited, procurements of these agreements are not subject to the Handbook procedures, which limits its own scope to procurement for use by the procuring entity. The NCC has not issued guidelines or procedures for other types of government contracts and therefore JamVac was not bound to follow any specific procedures in connection with the award of the contracts to AA.”<sup>58</sup>*

These pieces of evidence indicate that JAMVAC made attempts to ensure that it was following the proper guidelines as it regarded entering into the Airlift Agreements.

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<sup>58</sup> Memorandum which was dated December 1, 2008 from Ms. Chenee Riley, Assistant Attorney General, to Ms. Dorothy C. Lightbourne, Q.C., and which was copied to Mr. Douglas Leys, Q.C., Solicitor General.

However, according to the advice which was proffered to JAMVAC, by both the Ministry of Finance and the Public Service and the Attorney General's Chambers, the Air Service Agreements were not considered to fit within the parameters of the definition of procurement as no goods or service was being supplied to the Government of Jamaica.

Based upon the foregoing, the OCG has seen evidence to indicate that attempts were made to ensure that the correct procedures were followed. There was, however, in the OCG's considered opinion, no exempted activity that fits closely with the Airlift Guarantee Deals.

## **Were other Airlines approached regarding the Airlift Agreements?**

Mrs. Jennifer Griffith, in her response to the OCG, submitted a letter which was dated July 17, 2008. The referenced letter was addressed to the Minister of Finance and the Public Service, the Hon. Audley Shaw, from the Minister of Tourism, the Hon. Edmund Bartlett, and stated that “...*The Ministry of Tourism has been working along with JAMVAC in pursuing discussions with a number of airline representatives with a view to increasing airlift into Jamaica from strategic gateways in the United States...American Airlines (AA) agreed to add additional flights from three gateways...*”<sup>59</sup>

In this regard, the OCG, in its written Requisitions, which were dated 2009 May 27, to Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism, Mr. Lionel Reid, Executive Director, JAMVAC, Mr. John Lynch Chairman, JAMVAC and Minister Edmund Bartlett, asked the following question: “...*Did the Ministry of Tourism and/or JAMVAC have discussions with any other airline(s) regarding similar Airlift Agreements? If yes, please provide answers to the following questions:*

- i. Please provide the name(s) of the airline(s) that was/were approached;*
- ii. For each of the airlines named in Question #8(i) above, please give the name(s) of the airline representative(s) with whom discussions were held;*
- iii. Please indicate the date(s) on which the discussion(s) was/were held with each of the named individuals.”<sup>60</sup>*

In her sworn response to the OCG’s Requisition, Mrs. Jennifer Griffith, in a letter which was dated 2009 June 18, indicated that “*I do not know.*”<sup>61</sup>

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<sup>59</sup> Letter which was dated July 17, 2008, to the Minister of Finance and the Public Service, the Hon. Audley Shaw, from the Minister of Tourism, the Hon. Edmund Bartlett.

<sup>60</sup> OCG’s Requisitions which were dated 2009 May 27, to Mrs. Jennifer Griffith Permanent Secretary, Ministry of Tourism, Mr. Lionel Reid, Executive Director, JAMVAC, Mr. John Lynch, Chairman, JAMVAC and Minister Edmund Bartlett.



Minister Edmund Bartlett, in his sworn response to the OCG's Requisition, which was dated 2009 July 8, indicated that *"I am aware that JAMVAC, in executing its mandate, had been talking with a number of airlines between June and July 2008 (as prescribed in the letter dated July 17, 2009) however I do not routinely partake in these negotiations and am unable to give details as requested. Such matters are usually referred to me at the end of negotiations when my approval is necessary."*<sup>62</sup>

Mr. John Lynch, in his sworn response to the OCG's Requisition, which was dated 2009 July 16, indicated that *"Air Jamaica, Delta and US Airways"* were also approached. He further indicated that in regard to Air Jamaica, Mr. Paul Pennicook was approached.

However, in regard to Delta and US Airways, Mr. Lynch indicated that: *"I do not recall the names of the contacts at these airlines. We invited the said airlines to make proposals for potential routes. No proposal was for [sic] forthcoming from either airline...I do not recall the dates of the said discussions."*<sup>63</sup>

Mr. Lionel Reid, in his sworn response to the OCG's Requisition, which was dated 2009 July 16, also indicated that *"Air Jamaica, Delta and US Airways"* were also approached. He further indicated that, for Air Jamaica, Paul Pennicook was approached. However, for Delta and US Airways, he indicated that *"I do not recall the names of the contacts at these airlines. We invited the said airlines to make proposals for potential routes. No proposal was for [sic] forthcoming from either airline....I do not recall the dates of the said discussions."*<sup>64</sup>

Mr. Lynch and Mr. Reid also submitted a letter to support their assertions that Air Jamaica was approached by JAMVAC. In the letter which was dated 2008 March 26, Mr.

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<sup>61</sup> Letter from Mrs. Jennifer Griffith, which was dated 2009 June 18, in response to the OCG's Requisition.

<sup>62</sup> Letter from Minister Bartlett, which was dated 2009 July 8, in response to the OCG's Requisition.

<sup>63</sup> Letter from Mr. John Lynch, which was dated 2009 July 16, in response to the OCG's Requisition.

<sup>64</sup> Letter from Mr. Lionel Reid, which was dated 2009 July 16, in response to the OCG's Requisition.

Paul Pennicook, Senior Vice President, Commercial, Air Jamaica informed Mr. John Lynch that:

*“Pursuant to further discussions on Los Angeles, we have now revised the request for seat support.*

*Instead of seeking to have support all year long, this request is for support during the six (6) worst months of the year. The new formula calls for support for 5850 seats at (US\$260 per seat or \$1.521 million over a six-month period.*

*We trust that JAMVAC will be able to respond favorably to this request for support, which I am sure will work to our mutual benefit.”<sup>65</sup>*

Having regard to the foregoing letter, the OCG found that discussions were held with Air Jamaica regarding seat support. However, it must be noted that although Air Jamaica requested to have seat support during the six (6) worst months of the year, there is no indication that this request was reviewed or considered, as neither Mr. Lynch nor Mr. Reid had submitted any other communication between JAMVAC and Air Jamaica, regarding the request made by Air Jamaica, to the OCG.

In this regard, the OCG sent Follow-up Requisitions to Mr. Lynch and Mr. Reid. The Requisitions, which were dated 2009 July 21 and 2009 July 22, respectively, asked both public officials the following question:

*“In response to question # 10 of the OCG’s requisition, which was dated May 27, 2009, which read: “A letter dated July 17, 2008, that was that was addressed to the Minister of Finance and the Public Service from the Minister of Tourism, which was submitted to the OCG under cover of a letter from the Ministry of Tourism, dated September 17, 2008, stated that “...The Ministry of Tourism has been working along with JAMVAC in*

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<sup>65</sup> Letter which was dated 2008 March 26 from Paul Pennicook, Senior Vice President, Commercial, Air Jamaica to Mr. John Lynch

*pursuing discussions with a number of airline representatives with a view to increasing airlift into Jamaica from strategic gateways in the United States...American Airlines agreed to add additional flights from three gateways..." Did the Ministry of Tourism and/or JAMVAC have discussions with any other airline(s) regarding similar Airlift Agreements? If yes, please provide answers to the following questions:*

- i. Please provide the name(s) of the airline(s) that was/were approached.*
- ii. For each of the airlines named in Question #10(i) above, please give the name(s) of the airline representative(s) with whom discussions were held.*
- iii. Please indicate the date(s) on which the discussion(s) were held with each of the named individuals."*

*In your sworn response to the OCG which was dated July 16, 2009 and which is reproduced verbatim herein, you responded as follows:*

- a. Please provide the name(s) of the airline(s) that was/were approached;  
Air Jamaica, Delta and US Airways*
- b. For each of the airlines named in Question #8(i) above, please give the name(s) of the airline representative(s) with whom discussions were held;  
Air Jamaica – Paul Pennicook  
Delta, US Airways – I do not recall the names of the contacts at these airlines. We invited the said airlines to make proposals for potential routes. No proposal was forthcoming from either airline.*
- c. Please indicate the date(s) on which the discussion(s) was/were held with each of the named individuals.*

*I do not recall the dates of the said discussions.*

*Please indicate how the approach was made to Air Jamaica, Delta and US Airways, whether verbally or in writing. Where possible, please provide documentary evidence in support of your answer.*”<sup>66</sup>

In response to the OCG’s Requisition, which was dated 2009 August 11, Mr. Lynch indicated that:

*“The approaches made by Delta and US Airways were made verbally by the said airlines. No written documentation resulted from these approaches.*

*As regards the approach to Air Jamaica, this approach was made verbally to Mr. Paul Pennicook, as a representative of Air Jamaica. We have forwarded, under cover of response to the OCG’s requisition dated May 27, 2009, a letter dated March 26, 2008 from Paul Pennicook, Senior Vice President of Air Jamaica, to Mr. John Lynch. This is the only correspondence we can locate at this time regarding this matter.*”<sup>67</sup>

Mr. Reid, in his sworn response to the OCG’s Requisition, which was dated 2009 August 11, also indicated that:

*“The approaches made by Delta and US Airways were made verbally by the said airlines. No written documentation resulted from these approaches.*

*As regards the approach to Air Jamaica, this approach was made verbally to Mr. Paul Pennicook, as a representative of Air Jamaica. We have forwarded, under cover of response to the OCG’s requisition dated May 27, 2009, a letter dated March 26, 2008 from Paul Pennicook, Senior Vice President of Air Jamaica, to*

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<sup>66</sup> OCG’s Follow-up Requisitions to Mr. Lionel Reid, Executive Director, JAMVAC and Mr. John Lynch, Chairman, JAMVAC, which were dated 2009 July 22.

<sup>67</sup> Letter from Mr. John Lynch, which was dated 2009 August 11, in response to this OCG’s Requisition.

*Mr. John Lynch. This is the only correspondence we can locate at this time regarding this matter.”<sup>68</sup>*

Based upon the foregoing information, and the sworn responses from the respondents, the OCG found that there were no formal discussions held with other airlines regarding the consummation of similar agreements.

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<sup>68</sup> Letter from Mr. Lionel Reid, which was dated 2009 August 11, in response to the OCG’s Requisition.

**Has any portion of the US\$ 4.5 Million Guarantee been paid to American Airlines since the commencement of the Airlift Agreements?**

The OCG, in its written Requisitions, which were dated 2009 May 27, to Mrs. Jennifer Griffith Permanent Secretary, Ministry of Tourism, Mr. Lionel Reid Executive Director, JAMVAC, Mr. John Lynch Chairman, JAMVAC and Minister Edmund Bartlett, asked the following question:

*“Has any portion of the US\$4.5 Million guarantee been paid to American Airlines since the commencement of the airlift agreement? If yes, please indicate the total sums which have been paid to date and the associated shortfalls which have necessitated such payments(s).”*<sup>69</sup>

Mrs. Jennifer Griffith, in her sworn response to the OCG’s Requisition, which was dated 2009 June 18, indicated that *“None of the US\$4.5 million has been paid to American Airlines.”*<sup>70</sup>

Mr. Lionel Reid, in his sworn response to the OCG’s Requisition which was dated 2009 July 16, stated *“no”*.<sup>71</sup>

Mr. John Lynch, in his sworn response to the OCG’s Requisition, which was dated 2009 July 16, stated *“no”*.<sup>72</sup>

Minister Edmund Bartlett, in his sworn response to the OCG’s Requisition, which was dated 2009 July 8, also stated *“no”*.<sup>73</sup>

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<sup>69</sup> OCG’s Requisition which was dated 2009 May 27 to Mrs. Jennifer Griffith Permanent Secretary, Ministry of Tourism, Mr. Lionel Reid Executive Director, JAMVAC, Mr. John Lynch Chairman, JAMVAC and Minister Edmund Bartlett.

<sup>70</sup> Letter from Mrs. Jennifer Griffith, which was dated 2009 June 18, in response to the OCG’s Requisition.

<sup>71</sup> Letter from Mr. Lionel Reid, which was dated, 2009 July 16, in response to the OCG’s Requisition.

<sup>72</sup> Letter Mr. John Lynch, which was dated, 2009 July 16, in response to the OCG’s Requisition.

The initial sworn written evidence which has been provided to the OCG has indicated that no portion of the US\$ 4.5 Million Guarantee has been paid to AA.

### **New Developments on the Airlift Agreements**

In an article which was dated Thursday, 2009 October 22, that was posted on the Go-Jamaica website, and which was entitled “*Government could pay over \$133 million in AA deal*”, it was indicated that:

*“The Government could be asked to pay more than \$133 million to American Airlines as part of a revenue guarantee airlift agreement signed last November.*

*American Airlines made the arrangement with the government to service the Miami, Dallas and Chicago routes to Montego Bay.*

*Officials from the Tourism ministry and related agencies were responding to questions during the sitting of the Public Administration and Appropriations Committee of Parliament yesterday.*

*As part of the accord, the US carrier is expected to transport thousands of passengers to Jamaica.*

*However, there was a decline in bookings and American Airline recorded a shortfall of US\$1.5 million up to July 31, this year.*

*This was confirmed by Executive Director of Jamaica Vacations Limited (JAMVAC) Lionel Reid.*

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<sup>73</sup> Letter from Minister Edmund Bartlett, which was dated, 2009 July 8, in response to the OCG’s Requisition (See Appendix I)

*The Tourism Enhancement Fund (TEF), had provided letters of credit to secure the agreement with the US carrier on behalf of JAMVAC.*

*The total guarantee was set at US\$3 million.*

*Committee Chairman, Dr. Wykeham McNeill, observing that the loss for Miami and Dallas occurred during the best of the tourism season, questioned whether the country could lose the entire US\$3 million that was guaranteed.*

*Acknowledging that this was possible, Reid indicated that the country had no choice at the time it entered into this arrangement with American Airlines.*

*He told the committee that at the time the deal was signed the airline was about to withdraw its service from Dallas.*

*Pressed for further detail about the implications of the loss by the airline, Director of the Jamaica Tourist Board (JTB) John Lynch said the agreement will end early next month.*

*Lynch stressed that there would be no disruption in the service to Jamaica.*

*However, committee member Ronald Thwaites wanted Mr. Lynch to support his claim with figures.”*

*Late last year, Tourism Minister Edmund Bartlett had said that despite putting up the money for the American Airline guarantee, the deal might not cost the country "one cent".<sup>74</sup>*

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<sup>74</sup> Article which was dated Thursday, 2009 October 22, that was posted on the Go Jamaica website entitled “Government could pay over \$133 million in AA deal” (See Appendix VI)



Additionally, in a Jamaica Gleaner Article, which was dated 2009 October 23, and which was entitled “Gov’t haunted - AA-guarantee deal catches up with Jamaica”, it was indicated that:

*“THE JAMAICAN Government could be called on to pay more than J\$133 million to American Airlines as part of a revenue-guarantee airlift agreement signed last November.”*

*American Airlines inked the deal with Jamaican authorities to service the Miami, Dallas and Chicago routes to Montego Bay.*

*As part of the accord, the United States carrier would transport thousands of passengers to Jamaica.*

*However, there was a decline in bookings and the airline recorded a shortfall of US\$1.5 million up to July 31 this year.*

*This was confirmed by Lionel Reid, executive director of Jamaica Vacations Limited (JAMVAC), at a meeting of Parliament's Public Administration and Appropriations Committee (PAAC) on Wednesday.*

*"It can be called (on)," he told committee members. The Tourism Enhancement Fund had provided letters of credit to secure the agreement with the US carrier on behalf of JAMVAC. The total guarantee was set at US\$3 million.*

*A document provided by the Ministry of Tourism highlighted a deficit of over US\$1 million (more than J\$94 million) for the Dallas operation while the financial out-turn for Miami showed a loss of just over US\$570,000 (approximately J\$51 million).*

*However, the airline had a surplus of US\$181,107 (J\$16.1 million) for its Chicago operation.*

*Chairman of the PAAC, Dr Wykeham McNeill, observing that the loss for Miami and Dallas occurred during the best of the tourism season, questioned whether the country could lose the entire US\$3 million that was guaranteed.*

*Acknowledging that this was possible, Reid indicated that the country had "no choice" at the time it entered into this arrangement with American Airlines.*

*He told the committee that at the time the deal was signed, the airline was about to withdraw its services from Dallas. "They were also going to scale down significantly from Miami if we had not entered into these arrangements at that time," Reid explained.*

*The JAMVAC executive said a reduction in the number of flights would have had a negative impact on the sector, resulting in a sharp cut in room occupancy and declining revenues to the Government.*

*Pressed for further detail about the implications of the loss by the airline, director of the Jamaica Tourist Board, John Lynch, said the agreement would end early next month. He said at that time "a full accounting will take place".*

*He said American Airlines informed the minister recently that it would continue to service these routes "on its own" into the winter tourist season.*

*Lynch stressed that there would be no disruption in the service to Jamaica.*

*According to the JTB director, the agreement with American Airlines was "probably one of the best investments" the country made.*

*However, committee member Ronald Thwaites wanted Lynch to support his claim with figures. "I am Thomas, I need proof," he insisted.*

*McNeill also queried revenue guarantees in the sum of CAN\$360,900 to Transat, an airline out of Canada. He questioned the need for this arrangement contending that Air Canada and Air Jamaica serviced routes out of that country.*

*"They have gone into London, Ontario, taking flights out of Victoria, British Columbia, Calgary, Vancouver, Victoria; for the first time we'll have direct service from British Columbia. They have put in place an additional 18,000 seats for the winter season," he said.*

*Late last year, Tourism Minister Edmund Bartlett had said that despite putting up the money for the American Airline guarantee, the deal might not cost the country "one cent".<sup>75</sup>*

In order to ascertain the veracity of the referenced media reports, the OCG requested a copy of the Hansard of the Houses of Parliament's Public Administration and Appropriations Committee, which was dated 2009 October 21. The following are verbatim extracts of the discussions which were held regarding the Airlift Agreements:

*...Chairman: "Okay, Just two quick questions. First, I notice in the discussion where it speaks to 'noteworthy expenditure, previous year.' You speak to the American Airlines deal.*

*Mr. Reid: Yes.*

*Chairman: And you outlined how the American Airlines deal was structured. And you have put here that the Government requires Jamvac to guarantee certain revenues to American Airlines.*

*Mr. Reid: Chairman, that's a typographical error...*

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<sup>75</sup> Jamaica Gleaner Article, which was dated 2009 October 23 and which was entitled "Gov't haunted - AA-guarantee deal catches up with Jamaica" (See Appendix VI)

*Chairman: Yes, good.*

*Mr. Reid: The agreement required Jamvac...*

*Chairman: Now, the question that I would ask on this. It says here 'the financial out-turn of the Chicago operation was a surplus.' In other words, we came out of that route fairly early.*

*Mr. Reid: Yes.*

*Chairman: But you have continued in Dallas and Miami.*

*Mr. Reid: Yes.*

*Chairman: But we notice here that they have \$1 million and \$500,000, what are those figures?*

*Mr. Reid: The shortfall in the operation-just the financial out-turn up to that day.*

*Chairman: So, are you saying that American Airlines is going to call on, ultimately the TF for US\$1.5million.*

*Mr. Reid: It is possible.*

*Chairman: I don't understand you because the Minister came to the House and told the House that it was not-nothing was happening; that we had been able to secure and get out of everything, and we were good to go. But we notice here that-and there is a question that I would ask, the document here speaks up to the 31<sup>st</sup> July, 2009. So, this period of time would have been in the best period. That is the winter*

*season. We are now in the difficult period. So, if there was ever a time that there would be a call, I would expect that the time is in this July to December period. So, if we lost 1.5, would you, as the person looking at the figures, are you suggesting that we are going to lose the total \$3 million that was guaranteed?*

*Mr. Reid:*

*Chairman, I can't say that we are going to lose it. It is a good month, it is August. August is a very good summer month out of Dallas and it is possible that we will recover some. But there are also the months of September and October which everybody knows traditionally, are slow months. But, you see, Chairman, at the time we did this agreement, we had to, we had no choice because from Dallas, for instance, American Airlines was going to withdraw service entirely. We would not have had any service at all from American Airlines into Montego Bay from Dallas. They were going to, also scale down significantly from Miami if we had not entered into these arrangements at that time. So, we had to sure-up our positions because we have rooms in Jamaica that would have gone empty. It would have impacted negatively on employment and Government revenue flows.*

*Chairman:*

*But just for clarity, you are saying that the financial out-turn up to 31<sup>st</sup> July, that we were down \$1.5 million. So, if these figures hold truth, \$1.5 million of the bond put up by TF is going to be called by American Airlines to be paid over as part of the...*

*Reid:*

*It is liable to be called; It can be called.*

*Chairman: But this is complete opposite from what we were told in the House three months ago.*

*Mr. Lynch: If I may, the agreement with American ceases on the 4<sup>th</sup> November.*

*Mr. Reid: 2<sup>nd</sup> November*

*Mr. Lynch: 2<sup>nd</sup> November the contract ends, at which time full accounting will take place. Now, American Airlines has officially informed us, and the Minister, that the services that we helped them with over these periods, which the country-there is no doubt the country benefited, with the whole hub and spoke of which Mr. Reid- because the business has changed, the hub and spoke agreement, that they, on their own, will be continuing these services into the winter season. So, there will be no disruption in the service to Jamaica. Now, let's take a look on the Miami hub. Seventy-five percent of the traffic which comes to Montego Bay is from behind the gateway, which means that looking on Miami, only 25 percent of that load comes between-from 100 mile radius around Miami. Everything feeds from San Francisco, Los Angeles, the whole world converges in there, as far as Europe. If you look an [sic] Dallas, there are 39 million passengers that go through Dallas just for American every year. Jamaica just needs a little piece. We just want a little piece. This is the value of the hub and spoke system which we sought to develop. And it has given Jamaica tremendous access to markets that we never knew before. He would have had to have been running around trying to put a plane in Los Angeles... the programme that*

*he just about for US Air, there are 31 cities that are connecting to Phoenix. So, when somebody who is the Ash Wash sees your ad on television, it is an one transaction with that carrier to fly into one of these hubs. We have Delta in Atlanta. During the winter they run five flights a day-a week-sorry, a day into Montego Bay (Inaudible comment) Pardon me? Delta, Atlanta, Montego Bay.*

*Chairman But do we give seat support to Delta?*

*Mr. Lynch By us doing all of this work-we support Delta through advertising and our television ads. We have done the work with American. American is the biggest carrier. Others have followed suit. It probably was one of the best investments we made.*

*Rev. Thwaites: Hello, I have a problem. Can we just ask Mr. Lynch to explain; losing this money is one of the best investments we have made? Where is the proof?*

*Mr. Lynch: You are now going to-how many passengers did we generate?*

*Rev. Thwaites: Surely you would come and give us that.*

*Mr. Lynch: Pardon me?*

*Rev. Thwaites: I don't disbelieve you, you know. But I am Thomas. I need proof.*

*Mr. Lynch: I think we...how many?*

*Mr. Reid: Over 34,000 passengers from the Dallas route and in excess of 60,000 passengers...*

*Rev. Thwaites And you will be the first to tell me, the numbers though indicative are by no means the total proof. But, surely in justifying this to your Minister, you would have to be able to show him that there is a commensurate benefit for this cost. And I am asking that that be shared with us.*

*Mr. Reid Indeed, there is. In fact, we can give you that justification, in terms of numbers. Visitors that are brought in on those flights, and the number of room nights that they would have stayed, times the earning per visitor per day.*

*Mr. Lynch: Room tax, departure tax...*

*Chairman: Mr. Reid, I think the... (Inaudible comment) Yes. Mr. Reid, I think that the question that arises-there are really two, and I think what Mr. Thwaites is alluding to, when the American Airlines deal was structured, we were basically told-I mean, assured, that given how things were set up, there would be no call on it. At the time there were suggestions by members of the sector that it would be one of the issues that would help with the demise of Air Jamaica on the Miami route. And Air Jamaica was taken out. Now, American is the only carrier out of Miami. So, one would have thought that the deal, if it was viable before, would become even more viable because they would have taken over whatever Air Jamaica didn't have. So, how to be told that we are actually losing half-a-million dollars in the structure, somehow the other- what we anticipated has not come to pass. I think that is what we are asking*



*about because this is not - and even up to recently we were told that no, this would not happen. So, we are surprised to see this happening now.*

Based upon the information which was outlined in the news articles and the information that was contained in the Hansard, the OCG sought clarifications on the matter from Mr. John Lynch and Mr. Lionel Reid and, in particular, as it related to the possibility that JAMVAC would be called upon for any portion of the US\$4.5 Million Guarantee.

Consequently, by way of written Statutory Requisitions, which were dated 2009 October 23, Mr. Lynch and Mr. Reid were asked the following questions:

*“Reference is made to the OCG’s requisition that was dated May 27, 2009, in which you were asked the following question:*

*Has any portion of the US\$4.5 Million guarantee been paid to American Airlines since the commencement of the airlift agreement? If yes, please indicate the total sums which have been paid to date and the associated shortfalls which have necessitated such payment(s).*

*In your sworn response to the OCG, which was dated July 16, 2009, you stated “No”.*

*Please indicate if American Airlines Inc. has (1) billed the Government of Jamaica (GOJ) and/or any public body or (2) called upon any portion of the US\$4.5 Million guarantee subsequent to your initial assertion that no payments had been made. If yes, please provide responses to the following questions:*

- I. Provide details of the period for which American Airlines Inc. has billed the GOJ and/or the called upon guarantee;*

- II. *The routes for which the GOJ has been billed and/or the guarantee called upon;*
- III. *The total dollar value of the US\$4.5 million guarantee which has been billed and/or called upon by American Airlines Inc.*
- IV. *Has any payment been made to American Airlines Inc.? If yes, please state the total dollar value of the payment(s) and the date(s) on which the payment(s) was/were remitted;*
- V. *Please provide particulars of the shortfall(s) which has/have necessitated American Airlines Inc. billing and/or calling upon the GOJ and/or any public body for any portion of the US\$4.5 million guarantee;*
- VI. *Provide documentary evidence to support the claims and assertions which you have made.*<sup>76</sup>

In his sworn response to the OCG's Requisition, which was dated 2009 October 30, Mr. Lionel Reid indicated that:

*"American Airlines has not billed the Government of Jamaica and/or any public body.*

*American Airlines has not called upon any portion of the US\$4.5 Million guarantee subsequent to my initial assertion that no payments had been made.*<sup>77</sup>

In his sworn response to the OCG's Requisition, which was dated 2009 November 2, Mr. John Lynch also indicated that:

*"American Airlines has not billed the Government of Jamaica and/or any public body.*

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<sup>76</sup> OCG's Requisitions which were dated 2009 October 23, to Mr. Lynch and Mr. Reid.

<sup>77</sup> Response from Mr. Lionel Reid dated 2009 October 30.

*American Airlines has not called upon any portion of the US\$4.5 Million guarantee subsequent to my initial assertion that no payments had been made.*<sup>78</sup>

Mr. Lynch and Mr. Reid were also asked *“Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same.”*<sup>79</sup>

In their sworn response to the OCG’s Requisitions, they indicated *“No.”*<sup>80</sup>

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<sup>78</sup> Response from Mr. John Lynch dated 2009 November 2

<sup>79</sup> OCG Requisitions which were dated 2009 October 23 to Mr. John Lynch and Mr. Lionel Reid

<sup>80</sup> Responses from Mr. Lionel Reid and Mr. John Lynch dated 2009 October 30 and 2009 November 2, respectively.



Consequently, in a follow-up Requisition, which was dated 2009 October 8, Mrs. Griffith was asked the following question:

*“ A copy of an extract from the Minutes of Jamaica Vacation’s (JAMVAC) Board Meeting which was held on June 18, 2008, regarding the Air-lift Guarantee Agreement between JAMVAC and American Airlines indicated that: “Tabled at the meeting was letter from the Chairman dated 2008 June 12 to Mr. Peter Dolara, American airlines, indicating that the proposed agreement was subjected to governmental approval, which he was confident would be obtained at the Cabinet sitting on Monday June, 2008 following which he would be in a position to give a commitment on June 17, 2008.”*

*Please provide cop (ies) of all Cabinet Submission(s) and Decision(s) regarding the Air-lift Guarantee Agreement between JAMVAC and American Airlines.”*

By way of a letter, which was dated 2009 October 12, Mrs. Griffith requested an extension of the 2009 October 13 deadline to respond to the OCG’s referenced Requisition, to 2009 October 22. In the referenced letter Mrs. Griffith indicated that:

*“I am in receipt of your letter of October 8, 2009, requesting cop(ies) of all Cabinet Submission(s) and Decision(s) regarding the Airlift Guarantee Agreement between JAMVAC and American Airlines, by 3:00 p.m. in the afternoon on Tuesday, October 13, 2009.*

*I have only just had a change [sic] to go through Friday’s mail and unfortunately due to other pressing work commitments will not be able to meet tomorrow’s deadline. Accordingly, I would be able to meet tomorrow’s deadline. Accordingly I would appreciate an extension of time until October 22, 2009.*

*Your accommodation of this request would be greatly appreciated.”*

Mrs. Griffith's request for this extension was duly granted by the OCG.

Following upon the extension of the deadline, Mrs. Jennifer Griffith, by way of a letter which was dated 2009 October 22, to the OCG, and which was captioned "*Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million*" indicated that:

*"Having pursued the matter at caption please be advised that I will need Cabinet's permission to provide the Cabinet documents you requested.*

*Accordingly, a request will be made to Cabinet but the procedure requires an allowance of ten working days before a submission is placed on the agenda of Cabinet.*

*We are hereby requesting a further extension be granted until a decision has been taken by Cabinet."*

Consequently, the OCG, by way of a letter which was dated 2009 October 23, wrote to the Cabinet Secretary, Ambassador Douglas Saunders, and requested "...*a copy of all Cabinet Submissions and Decisions regarding the Airlift Guarantee Agreements which were consummated between JAMVAC and American Airlines.*"

In response to the referenced letter from the OCG, the Office of the Cabinet wrote to the OCG, under cover of a letter which was dated 2009 October 27. The referenced letter stated that:

*"We are in receipt of your letter dated 23<sup>rd</sup> October, 2009, concerning your enquiry in to the "alleged American Airlines Air-Lift Guarantee Deal", and the related Notice of Formal Requisition for Information and Documentation thereon. The Cabinet Office is*



*To date, however, this matter inexplicably remains outstanding and you have now, without any apparent lawful justification, requested a further two week extension to address same.*

*Be that as it may, the Requisition which is now before us, i.e. the Requisition of October 23, 2009, was directed by the OCG to the holder of the Office of the Cabinet Secretary of the Government of Jamaica and not to the Permanent Secretary in the Ministry of Tourism.*

*The subject Requisition was directed to you in pursuance of a formal Statutory Investigation which is now being conducted under the provisions of the Contractor General Act.*

*I would, therefore, in the circumstances, respectfully re-direct your attention to our Requisition to you of October 23, 2009 and, in particular the following provisions of the Contractor General Act:*

- (1) Section 18 (3) which provides that “For the purposes of an Investigation under this Act, a Contractor General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses **and the production of documents**”.*
  
- (2) Section 18 (4) which provides that “**Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person under the Official Secrets Act, 1911 to 1939 of the UK (or of any Act of Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor General for the purpose of an Investigation ...**”.*



(3) Section 29 which provides as follows:

*“Every person who –*

*(a) willfully makes a false statement to mislead or attempts to mislead a Contractor General or any other person in the execution of his functions under this Act, or*

*(b) without lawful justification or excuse –*

*(i) obstructs, hinders or resists a Contractor General or any other person in the execution of his functions under this Act; or*

*(ii) fails to comply with any lawful requirement of a Contractor General or any other person under this Act, ....*

*shall be guilty of an offence ...”.*

*In the premises, the Requisition which has been made of you and your Office is a Statutory Judicial Requisition whose satisfaction, by the expressed provisions of the law, does not require the “approval” of the Cabinet which, if it did, would suggest that any such “approval” could be lawfully withheld. In the alternative and/or additionally, the matter has been unjustifiably too long outstanding. This is the precise reason why it was re-directed to your Office with the expectation that its satisfaction would have been expedited.*

*By copy of this letter to the Hon. Prime Minister, the matter is also now being brought to his personal attention by me so that the OCG’s Investigation herein is not in any way further obstructed, impeded or delayed by the failure of the Cabinet to produce documents which should be capable of being easily located in the official files of the Cabinet Office within minutes.*

*In the premises, we would respectfully require you to produce copies of the referenced Cabinet Submissions and Decisions to the Office of the Contractor General no later than 2.00 PM on Wednesday, November 4, 2009. Your full and anticipated cooperation in this matter is appreciated.”*

Following upon the OCG’s insistence on being provided with the requisitioned information, same was submitted to the OCG by the Cabinet Secretary, Ambassador Douglas Saunders, under cover of a letter which was dated 2009 November 3.

Based upon the information which was received from the Cabinet Secretary, the OCG found that a Cabinet Submission regarding the Airlift Agreements, which was dated 2008 September 9, was sent from Minister Edmund Bartlett to the Cabinet for approval. Particulars of the Cabinet Submission are presented below:

**“CABINET SUBMISSION**

**JAMAICA VACATION LIMITED-CONTRACTUAL ARRANGEMENT WITH  
AIRLINES FOR ADDITIONAL SEAT SUPPORT**

- I. Cabinet is being asked to approve:*
  - i. Jamaica Vacations Limited (JAMVAC) entering into contingent guarantee arrangement with American Airlines and other airlines as economic opportunities arise;*
  - ii. the attached contracts between JAMVAC and American Airlines to provide additional flights to Jamaica from Miami, Chicago and Dallas gateways;*
  - iii. the Tourism Enhancement Fund facilitating the guarantee for the Letter of Credit with the National Commercial Bank in the amount of US\$1.5M per gateway.*

## **BACKGROUND**

2. *Cabinet may recall Decision No.45/07 dated December 17, 2007, which gave approval for the resuscitation of JAMVAC to more effectively carry out its mandate to:
  - I. *promote increased airlift of visitors to Jamaica;*
  - II. *support other tour operators servicing Jamaica;*
  - III. *operate in-house charters from selected gateways;*
  - IV. *support airlift from targeted markets.**

## **ISSUE**

3. *Globally, the biggest airlines are reducing services, increasing fare, levying surcharges and abandoning destinations as the cost of fuel continues to rise. The entire Caribbean region is now in a crisis as there have been significant cut backs by the major carriers who traditionally service the region. As a result, countries are forced to find creative ways of financing airlift to cater to both tourist and domestic travel.*
4. *From the United States of America (USA) all major carriers serving the Caribbean have significantly reduced service to the region, causing severe hardships in many islands. It is to be noted that American Airlines is the largest provider of air service from USA to the Caribbean, and they have significantly reduced service to some islands.*

## **PROPOSITION**

5. *Given its mandate, Cabinet is asked to be mindful of the fact that JAMVAC's raison d'e`tre is to develop strategies and respond to economic opportunities through the provision of incentives to commercial carriers to increase airlift to*

*Jamaica. Accordingly, JAMVAC has favorably considered a verbal, unsolicited proposal from American Airlines to provide additional seats from three American gateways for a guarantee of US \$1.5M each. These are daily flights from Dallas, five flights per week from Chicago and five flights from Miami. The total commitment of US\$4.5M will be needed to leverage these additional seats. (See Appendix 1). This amount may remain unused, but has to be committed as a safeguard.*

- 6. The Ministry of Tourism proposes to pool the resources of JAMVAC with the marketing support from Jamaica Tourist Board (JTB) to ensure the flights are fully supported. This will guarantee that the funds committed are not 'called upon'. The JTB will also be assigning its Regional Director for Airlines to work directly with American Airlines on a day- to- day basis to monitor the programme so as to minimize expenditure and not to encounter surprises.*

### **CONSULTATIONS**

- 7. The Ministry of Finance and the Public Service was consulted on the subject matter and their response is attached as Appendix 2.*
- 8. The Office of the Attorney General was asked to peruse the Contract and provide comments, attached as Appendix 3. Cabinet is asked to note, however, that the contracts issued by American Airlines are standard and are applicable to all countries to which this service is provided. They were therefore unwilling to draft a special contract for Jamaica.*

### **FINANCIAL CONSIDERATIONS**

*JAMVAC's 2008/2009 budget allocation allows a maximum spend of US\$2.5M on seat support and administrative expenses. This however, is grossly inadequate, given the*

*current challenges with respect to airlift. Based on the attached letter from the Ministry of Finance and the Public Service, JAMVAC approached the Tourism Enhancement Fund (TEF) for support. At the TEF Board meeting of July 23, 2008, a guarantee in the amount of US\$4.5M was approved on behalf of JAMVAC, in favour of American Airlines. This decision was taken in the context of the first of the Principal Objects of the Tourism Enhancement Fund Act, 2004 which speaks to the growth and development of the tourism sector:*

***Section 3(a) implement projects and programmes which impact on the growth and development of the tourism sector;***

*Please see Appendix 4, attached.*

*The guarantee, however, has not yet been issued.*

**RECOMMENDATION**

*Cabinet is being asked to approve:*

- i. Jamaica Vacations Limited (JAMVAC) entering into contingent guarantee arrangement with American Airlines and other airlines as economic opportunities arise;*
- ii. the attached contacts[sic]between JAMVAC and American Airlines carrying additional flights from Miami, Chicago and Dallas gateways...*
- iii. the Tourism Enhancement Fund facilitating the guarantee for the Letter of credit with the National Commercial Banking the amount of US\$1.5M per gateway.”<sup>83</sup>*

In a Cabinet Decision No. 31/08, which was dated 2008 September 15, and which was submitted to the OCG by the Cabinet Secretary, Ambassador Douglas Saunders, under cover of the said letter which was dated 2009 November 3, it was stated that:

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<sup>83</sup> Cabinet Submission submitted to the Cabinet from Minister Edmund Bartlett, which was dated 2008 September 9. (See Appendix IV)

*“The Cabinet considered Submission No.519/MT-12/08 in connection with a proposal that Jamaica Vacations Limited (JAMVAC) enter in contractual arrangements with airlines for additional seat support; and decided that the matter should be withdrawn from the Agenda to allow for further consultations on the recommendations and alternative proposals, including consultations with the Attorney General’s Department.”<sup>84</sup>*

Based upon the foregoing, the OCG found that there was no Cabinet Approval for the Airlift Guarantee and that the Cabinet had recommended that the matter be withdrawn from the Agenda to allow for further consultation on the recommendations.

It is also instructive to note that the referenced Cabinet Submission indicated that *“JAMVAC has favorably considered a verbal, unsolicited proposal from American Airlines to provide additional seats from three America gateways for a grantee of US \$1.5M each.”*

This is contrary to the information which was supplied to the OCG by Minister Bartlett in response to the question of *“What is the extent of your knowledge of the American Airlines Air-Lift Guarantee Deal?...”* in response to the OCG’s Requisition which was dated 2009 May 27.

In his sworn response, Minister Bartlett indicated that, based upon AA’s intentions to reduce its flights to Jamaica, *“I spoke to Mr. John Lynch, the Chairman of Jamaica Vacations Limited (JAMVAC), and it was decided that it was imperative to take some form of action with a legacy carrier to ensure that Jamaica continued to enjoy a steady flow of patrons to the island”*

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<sup>84</sup> Cabinet Decision which was dated 2009 September 15 submitted to the Cabinet from Minister Edmund Bartlett (See Appendix IV)

In the referenced Requisition of 2009 May 27, Minister Bartlett was also asked the following question:

*“The Ministry of Tourism, in an ‘Executive Summary of the Genesis of the Air Service Agreements between Jamaica Vacations and American Airlines’, which was submitted to the OCG, under cover of letter dated September 17, 2009, asserted, inter alia, that, “...JAMVAC in pursuit of its primary objectives and core function accepted a verbal, unsolicited proposal from American Airlines to provide additional service from three (3) gateways in the United States of America.”*

*Please answer the following questions and, where possible, provide documentary evidence in support of any assertions made.*

- i. Please indicate the date on which the verbal, unsolicited proposal was received from American Airlines;*
- ii. Please state the name(s) of the representative(s) of American Airlines who presented the verbal unsolicited proposal;*
- iii. Please state the name(s) of the Government of Jamaica representative(s) to whom the verbal, unsolicited proposal was presented;*
- iv. Please provide full particulars of the circumstances, inclusive of location, under which the verbal, unsolicited proposal was initially presented by and to all parties;”*

In his sworn response to this question, Minister Bartlett indicated that *“As the primary advance by AA was not made to me, I cannot answer this question.”*

**Was there any indication of impropriety and/or irregularity regarding this deal?**

A review of the documentation which has been provided to the OCG and, in particular, as it regards the Cabinet Submission and Cabinet Approval, as well as the date of signing of the contracts, has revealed a certain degree of impropriety and irregularity.

First, it must be recalled that obtaining Cabinet Approval was held out by JAMVAC as a precondition for the consummation of the Air Service Agreements. This material fact was conveyed to representatives of American Airlines by way of letter which was dated 2008 June 12 at which time it was indicated that *“a commitment of this nature requires the approval of the Cabinet.”*

Despite this expressed requirement and even the attempt which was made to obtain Cabinet Approval, the following is a summation of the impropriety and irregularity which has obtained:

1. According to Mr. John Lynch, in his sworn statement to the OCG, *“all three agreements were signed contemporaneously prior to August 11, 2008.”*<sup>85</sup>;
2. The documentation that has been provided to the OCG has revealed that a Cabinet Submission, which was dated 2008 September 9, had been sent to the Cabinet for Approval;
3. The Cabinet, via Cabinet Decision No. 31/08, did not grant approval for the referenced Air Service Agreements, but rather *“decided that the matter should be withdrawn from the Agenda to allow for further consultations on the recommendations and alternative proposals, including consultations with the Attorney General’s Department.”*

Collectively taken, and should the sworn statement of Mr. John Lynch be accepted as accurate and truthful, which, by law, it must be, the Cabinet of Jamaica, as at 2008

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<sup>85</sup> Letter which was dated 2009 December 2 in response to the OCG’s Requisition.



September 9, would have been requested to '*rubber stamp*' the already consummated Airlift Agreements, which, according to Mr. Lynch, were signed prior to 2008 August 11.

Therefore, the OCG has found what it considers to be a highly improper and irregular state of affairs surrounding the approval of the referenced Air Service Agreements, as the documented request for Cabinet approval occurred (1) after the Air Service Agreements were signed and (2) the documentary evidence that has been provided to the OCG has not revealed that such approval was in fact granted by the Cabinet.

In addition to the foregoing, the referenced state of irregularity is further compounded by the fact that the OCG has found that the Cabinet of Jamaica, was in fact misled as the information that was contained in the Cabinet Submission asserted that "... *JAMVAC has favorably considered a verbal, unsolicited proposal from American Airlines to provide additional seats from three American gateways for a guarantee of US \$1.5M each.*"

However, the aforementioned statement has been contradicted by the sworn statements which have been provided to the OCG and which have revealed that American Airlines was in fact approached by representatives of JAMVAC.

Further, in order to ascertain whether there were any other instances of impropriety and/or irregularity, the OCG also asked the following question at the end of each Requisition.

*" Do you know, or do you have, or have you had a personal, business or other relationship with, any of the principals, shareholders, directors, partners, officers and/or employees of American Airlines, (hereinafter referred as 'Airline Representative'), which has been awarded the American Airlines Air-Lift Guarantee Deal? If yes, please indicate:*

- i. *The full name of the 'Airline Representative' and his/her relationship with the Airline;*
- ii. *The length of time that you have known the 'Airline Representative';*
- iii. *A full description of the nature of the relationship between yourself and the 'Airline Representative'.*”

All the respondents answered “no” to this question with the exception of Mr. John Lynch and Mr. Anthony King.

It is instructive to note that Mr. Lynch, in his sworn response to the OCG, which was dated 2009 July 16, indicated that:

*“I have enjoyed a long-standing working relationship in excess of twenty years with Mr. Dolara as I had business dealings with him while employed to Sandals. I have no personal relationship with Mr. Dolara.”*

Mr. Anthony King in his sworn response to the OCG, which was dated 2009 July 21, indicated that:

*“As Regional Director Airlines and Tour Operator USA for the JTB my responsibilities are to get advance schedules, know of changes in schedules, and advance booking data. The person from whom I get my weekly brief is **Carlos Tate** Caribbean and Latin America Marketing. **Gary Alfson** Marketing Development Manager, Caribbean, Miami and Latin America, I met at his Miami office personally for the first time, introduced by Mr. Lynch. I have spoken to him in the past about schedules. I was introduced to **Peter Dolaro** by the Director of Tourism **John Lynch**, late 2008, the same time as **Gary Alfson**, not sure of his title but he is the CEO for American Airlines Caribbean, Miami and Latin America markets. I do not call him on any matters personal or to do with American Airlines.*

*I know **Carlos Tate** from 1985 or about that year when I was a Sales Representative of the JTB based in New York, he was the American Airlines, Sales Representative based in New York. The relationship was seeing him at travel functions, and travel trade shows. He left the region after ten years or about and I did not make contact with him until I was made Regional Director Airline and Tour Operator in 2004. **Gary Alfson** I met via the telephone in my search for American Airlines information some five to six years ago. I renewed my acquaintance and met him personally at the time when I met **Peter Dolaro** late 2008. **Peter Dolaro** I knew of but met him for the first time when introduced by **Mr. Lynch**, and I have no relationship with him person or professional at my level.”<sup>86</sup>*

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<sup>86</sup> Letter from Mr. John Lynch, which was dated 2009, July 16, in response to the OCG’s Requisition. (See Appendix I)

**OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA**

**Supplemental Report of Investigation into the Retention of the Legal Services of the  
Law Firm DunnCox by JAMVAC**

## **Supplemental Report of Investigation**

### ***The Retention of the Legal Services of DunnCox***

The OCG, upon being advised by the law firm DunnCox, by way of letter which was dated 2009 June 9, that it now acts *‘for and on behalf of Jamaica Vacations Limited (JAMVAC) and the Tourist Enhancement Fund (TEF)’* and that its services were *“retained to assist JAMVAC and TEF with its compliance to the said requests, ”* began monitoring the retention of the referenced legal services, pursuant to Section 4(1) of the Contractor General Act.

Consequently, by way of a letter, which was dated 2009 June 10, the OCG wrote to the Permanent Secretary in the MOT, Mrs. Jennifer Griffith, raising certain critical questions pertaining, *inter alia*, to the propriety of the actions of certain representatives of JAMVAC and TEF.

The OCG’s letter of 2009 June 10 also advised the Permanent Secretary of the OCG’s decision *“... inter alia, to monitor the procurement of the legal services which are being provided by DunnCox, to the named representatives of JAMVAC and TEF.”* in keeping with the OCG’s statutory Section 4 (1) mandate.

Subsequently, it must be noted, the referenced legal services, which were provided by DunnCox, were retained solely by JAMVAC on behalf of Mr. John Lynch, Chairman of the Board and Mr. Lionel Reid, Executive Director.

The services of DunnCox were not retained by the TEF.

The OCG’s initial concerns and acute interest in the propriety of the retention of the legal services of DunnCox, by JAMVAC, emanated from the fact that in the conduct of more than fifty (50) Investigations, during which senior public officers and officials, inclusive

of the Prime Minister, several Ministers of Government and several Permanent Secretaries were directly requisitioned by the OCG, this was the first time that such an occurrence had manifested itself and under circumstances in which no one was directly accused of any wrongdoing and/or impropriety.

In virtually all of these instances, the responses, which were all required to be declared before a Justice of the Peace, were provided to the OCG by the individuals themselves with no attributed legal costs being levied against the Jamaican Taxpayers.

Indeed, the OCG's attention in the instant matter, regarding JAMVAC and TEF, was first peaked when, upon the issuance of its first set of statutory requisitions in 2009 May, a decision was taken by certain public officials/officers of JAMVAC and TEF to retain legal services, although the OCG's enquiry did not delve into the realm of criminal or egregious unlawful conduct nor were any allegations or inferences of criminal or egregious unlawful conduct made.

Further, the OCG was also fortified in its questioning of the appropriateness of the retention of legal services by the officials of JAMVAC and TEF given the fact the Permanent Secretary of the MOT, Mrs. Jennifer Griffith, who, under law, is the Accounting Officer for JAMVAC and TEF, had neither sought nor advised the OCG of her intention to secure legal services in responding to the almost similar questions which were posed to the representatives of the TEF and JAMVAC, namely Mr. Lionel Reid and Mr. John Lynch, by the OCG.

Additionally, in 2008 September, Mrs. Griffith had already provided the OCG with relevant information and documentation, regarding the very subject matter of the Investigation, without recourse to the services of an Attorney-at-Law from the private bar.

As such, the OCG, in its letter of 2009 June 10, in very unequivocal terms expressed its grave concern “...*about the propriety with which public officials/officers can commit the Taxpayers of Jamaica to such an expense should an attempt be made to obtain some degree of accountability from them, in the discharge of their duties as public servants.*”

In so doing, the OCG voiced its clear and unambiguous concerns regarding the principle of the matter and, in particular, as it regards the engagement of the services of a private law firm by public officials/officers when they are called upon to be held accountable during the discharge of their official public duties.

In addition to same, the OCG was also concerned with the propriety of JAMVAC and TEF retaining the legal services of DunnCox to assist with the provision of responses to the OCG’s interrogatories, at the expense of the Jamaican Taxpayers and, in so doing, sought to ascertain the following information in its letter of 2009 June 10:

1. The approvals which had been granted to undertake the procurement;
2. The cost of the retention of the services of DunnCox and at whose expense;
3. The reasons for retaining the services of DunnCox and whether there was any form of competition; and
4. The nature of the services which were to be rendered by DunnCox.

Reproduced, hereunder, is a verbatim copy of the OCG’s letter of 2009 June 10, which articulates the OCG’s positions and considered opinions regarding the legal services which were retained by JAMVAC on behalf of Mr. John Lynch and Mr. Lionel Reid:

*“June 10, 2009*

*Mrs. Jennifer Griffith  
Permanent Secretary  
Ministry of Tourism  
1<sup>st</sup> & 3<sup>rd</sup> Floors*

64 Knutsford Boulevard  
Kingston 5

Dear Mrs. Griffith:

**Re: Retention of Legal Services by Jamaica Vacations Limited and the Tourism Enhancement Fund to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act - Conduct of Investigation Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million**

Reference is made to the matter at caption and, in particular, an Investigation which was initiated by the OCG in September 2008, pursuant to the investigative powers which are reserved to a Contractor General as provided for by Sections 15(1) and 16 of the Contractor General Act (1983).

The OCG's Investigation into the referenced matter was convened following, inter alia, the publication of a media article in the Daily Gleaner of September 4, 2008 and the receipt of a letter from a concerned citizen.

Pursuant to the conduct of the Investigation, preliminary information was obtained from you in September 2008. Following a review of the referenced preliminary information, the OCG deemed it prudent to request the provision of additional information from the accountable and/or other senior officers/officials of the public bodies which are the subject of the Investigation, namely, the Ministry of Tourism, Jamaica Vacations Limited (JAMVAC) and the Tourism Enhancement Fund (TEF). Thus, written statutory requisitions were directed to several officers/officials of the named public bodies on May 27, 2009.

Subsequently, the Office of the Contractor-General (OCG), by way of letter which was dated June 9, 2009, has been advised by the law firm, DunnCox, that it now acts 'for and on behalf of Jamaica Vacations Limited (JAMVAC) and the Tourist Enhancement Fund (TEF)' and that its services were "retained to assist JAMVAC and TEF with its compliance to the said requests."



*In this particular regard, the letter advised the OCG that DunnCox would be representing some of the public officials/officers to whom the OCG's Requisitions were directed. The named persons are as follows:*

- 1. Mr. John Lynch, Chairman, Jamaica Vacations Limited;*
- 2. Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited;*
- 3. Mr. Godfrey Dyer, Chairman, Tourism Enhancement Fund; and*
- 4. Mr. Ian Neita, Executive Director, Tourism Enhancement Fund.*

*It is important to note that none of the named individuals has been accused by the OCG of any wrongdoing and/or impropriety.*

*Whilst the OCG is aware that every individual has a right to obtain legal representation in any matter, if so desired, the OCG must nonetheless question the propriety of Government accountable/accounting officers/officials and other public servants, who are requisitioned in the said capacities, to seek such legal recourse at the expense of the Jamaican Taxpayers.*

*The fundamental issue is not one of the public servant's right to obtaining legal representation, but rather the propriety of doing so in a matter which requires the simple disclosure of information regarding the discharge of their daily functions and responsibilities in their capacities as public servants, for matters which are related to the public body/bodies for which they are accountable.*

*The actions which have been taken by representatives of JAMVAC and TEF, and which are explicitly conveyed by the correspondence from DunnCox, begs the question as to whether or not public officials, who are accountable, both in law and administratively, for public bodies and/or agencies, can properly retain such services in the pursuit of responding to questions which are within the remit of their lawful public offices and responsibilities.*

*Given the import of the situation, the OCG has decided, inter alia, to monitor the procurement of the legal services which are being provided by DunnCox, to the named representatives of JAMVAC and TEF.*

*Accordingly, in your capacity as the Accounting Officer of all of the above referenced public bodies, we now direct your attention to the following questions which we consider to be of relevance to our monitoring activities and to which you must provide fulsome responses.*

- 1. Are you aware of the retention of the legal services of DunnCox by JAMVAC and TEF? If yes, please provide answers to the following questions:*
  - a. The date on which you became aware of same;*
  - b. The basis upon which it was decided that the legal services of DunnCox would be retained;*
  - c. The name(s) of the person(s) who approved the procurement of the legal services of DunnCox;*
  - d. The name(s) of the person(s) and/or entity(ies) and/or public body(ies) which is/are responsible for the payment of all costs associated with the retention of the legal services of DunnCox.*
  
- 2. Are the respective Boards of JAMVAC and TEF aware of the retention of the legal services of DunnCox? If yes, please indicate the date and circumstances under which each Board became aware of same.*
  
- 3. Did the Boards of JAMVAC and TEF approve the procurement of the legal services of DunnCox? If, yes, please provide documentary evidence in support of your response and/or any assertions made.*
  
- 4. Please indicate the procurement methodology which was utilized in the retention of the legal services of DunnCox and provide documentary evidence regarding all approvals which were received for the referenced procurement.*
  
- 5. Please detail the rates which are being charged by DunnCox for each of the services which are being provided to the officers/officials of JAMVAC and TEF.*

*Please provide a written response to the listed questions. Your response should be delivered in a sealed envelope, marked 'Confidential' and addressed to the Contractor General. **The envelope must be deposited at the reception desk of the Offices of the Contractor General, PIOJ Building, 16 Oxford Road, Kingston 5, no later than 2:00 p.m. on Friday, June 19, 2009.***

*The OCG must reiterate that it is gravely concerned about the propriety with which public officials/officers can commit the Taxpayers of Jamaica to such an expense should an attempt be made to obtain some degree of accountability from them, in the discharge of their duties as public servants.*

*What, therefore, obtains, are simple questions which, for the sake of propriety and accountability, deserve to be answered. Amongst the questions which are of critical concern to the OCG are:*

- (1) Where should the line be drawn with respect to the matters which are under consideration?*
  
- (2) Why, when, and in what circumstances, should public bodies and public servants obtain advice from private legal firms in matters which are related to the discharge of their public duties, particularly having regard to the fact that Section 79(1) of the Constitution of Jamaica provides that **“There shall be an Attorney General who shall be the principal legal adviser to the Government of Jamaica.”** ?*

*We have attached, herewith, for your kind attention, a copy of the correspondence from the law firm DunnCox, which is dated June 9, 2009, advising, inter alia, that its services have been retained by both JAMVAC and TEF.*

*In light of the questions which have arisen, the OCG, by copy of this letter, is advising the Cabinet Secretary, the Financial Secretary, the Auditor General, the Attorney General, the Chairman of the Public Accounts Committee of the Parliament of Jamaica and the Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica, of its concerns regarding the propriety of the retention of the legal services of a private law firm for matters such as the one in question.*

*Whilst we are aware that the Ministry of Finance and the Public Service's Circular #35, dated September 22, 2008, purports to exempt the procurement of legal services from the ambit of the Government of Jamaica Handbook of Public Sector Procurement Procedures, we wish to make it pellucidly clear that such an exemption does not, in any way, remove the procurement of legal services from the scrutiny of the OCG.*

*In point of fact, Section 4(1) of the Contractor General Act, expressly provides, inter alia, that:*

*1. Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament --*

*a. to monitor the award and the implementation of government contracts with a view to ensuring that --*

*i. such contracts are awarded impartially and on merit;*

*ii. the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity; ...”*

*It is against this background that the OCG, in the pursuit of its mandate to ensure impartiality, merit, propriety and regularity, in the award of government contracts, voices its concern regarding the principle of the matter and awaits, inter alia, your kind and timely responses to the requisitions which have been directed to you.*

*We so respectfully advise.”<sup>87</sup>*

In response to the OCG's letter of 2009 June 10, Mrs. Jennifer Griffith, Permanent Secretary, MOT, under cover of letter which was dated 2009 June 18, advised the OCG as follows:

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<sup>87</sup> OCG letter which was dated 2009 June 10, and which was addressed to the Permanent Secretary, MOT

***“Response to Question 1***

*I am aware of the retention of legal services of DunnCox by JAMVAC and TEF.*

- a) Since receipt of the various letters from the OCG dated May 27, 2009, there have been ongoing discussions about the need for legal representation. On Friday June 5<sup>th</sup> I was made aware that a preliminary meeting with a lawyer was scheduled for Monday June 8<sup>th</sup>, 2009.*
  
- b) Based on my understanding, persons to whom the letters were addressed did not consider the nature of some of the requisitions/questions to be routine. There was also the threat of criminal prosecution in item (e) on page 5 of 9. The request for responses to be declared and certified before a Justice of the Peace was also considered to be non-routine. Please be reminded too that I had already responded on September 17, 2008 to questions raised on the same matter by the OCG and had provided all documents that I had, including copies of the draft contracts. Furthermore, when I requested extension of time in which to respond to the letters of May 27, 2009, on behalf of persons who where[sic] travelling or scheduled to travel overseas during the period, I was advised in writing by Mr. Maurice Barrett, Chief Investigator, that “any representations and/or requests for an extension of time must be made by the respective individuals themselves and/or their Attorneys-at-law”.*
  
- c) DunnCox was suggested by Mr. John Lynch*
  
- d) This matter is to be discussed by the relevant parties.*

### ***Response to Question 2***

*The Board of Directors of the TEF is aware. I was advised that the matter will be discussed by the Board of JAMVAC at its upcoming meeting.*

*The matter was discussed at a TEF Board meeting held on June 1, 2009 and approval was given for the retention of legal service ( see excerpt from minutes attached).*

### ***Response to Question 3***

*Please see response to question 2 above.*

### ***Response to Question 4***

*Reference is made to section No. S-1000 (Page 1 of 4) of the **Government of Jamaica Handbook of Public Sector Procurement Procedures, November 2008.** Under No. III. that deals with Exclusions, item (4) lists legal services for non-routine assignments and litigation. As indicated in response to question 1 above, the parties involved did not consider the matter to be routine questions.*

### ***Response to Question 5***

*I am aware that there was one preliminary meeting with a lawyer. I am not aware of what rates have been agreed.”<sup>88</sup>*

The responses which were provided by the Permanent Secretary revealed that the representatives of JAMVAC did not consider the OCG’s requisitions to be non-routine and as such relied upon the exemption which is contained in Circular #35 from the Ministry of Finance and the Public Service.

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<sup>88</sup> Letter dated 2009 June 18 from the Permanent Secretary , MOT, to the OCG.

It is instructive to note that the OCG, in its letter of 2009 June 10, had already indicated that the exemption from certain aspects of the Government Procurement Procedures, which was granted to JAMVAC and TEF by Circular # 35, had in no way removed the scrutiny of the procurement of legal services from the purview of the Contractor General Act or, more particularly, from the contract monitoring and investigation jurisdictions of the Contractor General.

Further, it must be made pellucidly clear that the OCG, in advising the Permanent Secretary that requests for extensions of time must emanate from the persons to whom the Statutory Requisitions were issued, or from their Attorneys-at-Law, was by no means instructing or advising that the services of an Attorney-at-Law should be procured, much less at the expense of the Jamaican Taxpayers.

Indeed, the OCG, in considering matters pertaining to its Statutory Requisitions, requires that any representations so made, regarding same, are done by the persons to whom the Requisitions are made or by someone who has the legal authority to make representations on behalf of the requisitioned individual. In such instances, an Attorney-at-Law and/or an individual having bestowed with the “power of Attorney” are considered suitable proxies.

Therefore, the OCG’s representation that any request for an extension of time should, *inter alia*, be made by an Attorney-at-Law was by no means a ‘*licence*’ to thrust such an expense upon the Jamaican Taxpayers.

It must be noted that as at 2009 June 18, when the Permanent Secretary responded to the OCG’s requisition, and some nine (9) days after DunnCox had advised the OCG, in writing, that its services had been retained by JAMVAC and TEF, the OCG was informed, *inter alia*, that:

1. The person(s)/entity(ies) responsible for payment of the costs was “*to be discussed by the relevant parties.*”;

2. The Board of TEF was aware of the retention of the legal services of DunnCox and had approved same at its meeting of 2009 June 1, however, *“the matter will be discussed by the Board of JAMVAC at its upcoming meeting;”*
3. As Permanent Secretary, and the Accountable Officer for JAMVAC and TEF, Mrs. Jennifer Griffith was not aware of the rates which had been agreed upon.

Having received and reviewed the referenced correspondence from the Permanent Secretary, Mrs. Jennifer Griffith, the OCG, under cover of a letter which was dated 2009 June 30, again wrote to the Permanent Secretary reiterating its previous concerns and requesting further particulars of the retention of the legal services which were being rendered by DunnCox.

The OCG’s letter of 2009 June 30 was written in further pursuit of the OCG’s Section 4 mandate and also due to the dearth of information which was provided by the Permanent Secretary, inclusive of the fact that certain approvals had not been obtained, despite the fact that DunnCox, as at 2009 June 9, was purportedly representing both JAMVAC and TEF.

The responses which were provided by the Permanent Secretary revealed an untenable state of affairs which, if left unaddressed, would have left the procurement process flagrantly improper and irregular and, consequently, in breach of the Contractor General Act.

Consequently, the OCG was particularly interested in finding out if the referenced procurement would have been permitted without the requisite approvals, what remedial action would be undertaken and also to obtain full particulars of the rates which were to be charged and the person(s) and/or entity(ies) which would be responsible for the payment of the fees.



Reproduced below is the OCG's correspondence of 2009 June 30, which was addressed to the Permanent Secretary, Mrs. Jennifer Griffith:

*“June 30, 2009*

*Mrs. Jennifer Griffith  
Permanent Secretary  
Ministry of Tourism  
1<sup>st</sup> & 3<sup>rd</sup> Floors  
64 Knutsford Boulevard  
Kingston 5*

*Dear Mrs. Griffith:*

***Re: Retention of Legal Services by Jamaica Vacations Limited and the Tourism Enhancement Fund to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act - Conduct of Investigation Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million***

*We acknowledge receipt of your letter dated June 18, 2009, which was written in response to ours of June 10, 2009, in the captioned regard.*

*The OCG notes the responses which have been posited by you in response to the requisition which was made of you in our letter of June 10, 2009.*

*It is with some consternation that, despite the responses which you have provided in and under cover of your letter of June 18, 2009, the OCG must again question the appropriateness of the 'course of action' which has been taken by the representatives of Jamaica Vacations Limited (JAMVAC) and the Tourism Enhancement Fund (TEF).*

*With regard to the aforementioned, it must be noted that under law, and in particular, the Financial Administration and Audit Act (FAA Act), you are the Accounting Officer with overall responsibility for the affairs of your Ministry and its affiliate agencies/public bodies.*

*As has been noted in your response, you have, on two separate occasions, provided the OCG with information and documentation regarding the captioned matter. On the very last occasion, you were issued a written statutory requisition, with the same stipulations and requirements as the other representatives of JAMVAC and TEF, yet, it is noted that you did not deem it necessary to rely upon or engage the services of Attorneys-at-Law.*

*With specific reference to the engagement of the services of DunnCox, and the responses which have been provided by you, it is noted that (a) the Board of Directors of JAMVAC, as at the date of your letter, had not yet approved the procurement of the legal services; (b) the person(s), entity(ies) and/or public body(ies) who will be responsible for the payment of costs associated with the retention of legal services has/have not yet been decided upon; and (c) you, as the Accounting Officer, are not aware of the rates which have been agreed upon and are being charged for the referenced legal services.*

*The prevailing circumstances exist despite the very clear and unequivocal fact that the services of DunnCox have been engaged and the referenced law firm is representing officers/officials of both JAMVAC and TEF.*

*What therefore still remains an anomaly is, as was expressed in our letter of June 10, 2009, “Why, when, and in what circumstances, should public bodies and public servants obtain advice from private legal firms in matters which are related to the discharge of their public duties, particularly having regard to the fact that Section 79(1) of the Constitution of Jamaica provides that “**There shall be an Attorney General who shall be the principal legal adviser to the Government of Jamaica.**” ?”*

*Having reviewed the responses which were provided in your letter of June 18, 2009, please respond to the following additional questions. Your response should be delivered in a sealed envelope, marked ‘Confidential’ and addressed to the Contractor General. **The envelope must be deposited at the reception desk of the Offices of the Contractor General, PIOJ Building, 16 Oxford Road, Kingston 5, no later than 2:00 p.m. on Wednesday, July 8, 2009.***

- 1. Please indicate what action will be taken regarding the procurement of legal services by JAMVAC and TEF given the following:*

- a. *No proper procedures seem to have been employed in the procurement/contracting of the legal services of DunnCox, as is evidenced by the response provided in your letter of June 18, 2009;*
  - b. *The response which has been provided by you reveals that you are not aware of the rates which have been agreed upon for the legal services which are being provided by DunnCox.*
2. *Do you, as the Accounting Officer, intend to allow and/or continue with the contractual arrangement in its existing form?*
  3. *Please ascertain and advise of the rates which have been agreed upon by JAMVAC and TEF for the legal services which are being provided by DunnCox. Please indicate if those rates are the same as those which are being charged.*
  4. *Please ascertain and advise which person(s), entity(ies) and/or public body(ies) will be responsible for the payment of the legal fees.*

*The OCG must again voice its concern regarding the principle of the matter and reiterates the positions which were outlined in our letter of June 10, 2009.*

*We await your kind and timely response to the requisition which has been directed to you.*

*Yours sincerely,*

*Craig Beresford (Signed)*

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*Craig Beresford*

*Senior Director, Monitoring Operations,*

*Corporate Communications and Special Projects*

*for and on behalf of the Contractor General <sup>89</sup>*

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<sup>89</sup> OCG letter dated 2009 June 30 which was addressed to the Permanent Secretary, MOT.

It must be noted that due to the gravity of the OCG's concerns, the referenced correspondence of 2009 June 10 and 2009 June 30, were copied to several public officials including Ambassador Douglas Saunders, Cabinet Secretary; Ms. Sharon Crooks, then Financial Secretary; Ms. Pamela Monroe-Ellis, Auditor General; Dr. Omar Davies, Chairman of the Public Accounts Committee of the Parliament of Jamaica; Dr. Wykeham McNeil, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica; Senator the Hon. Dorothy Lightbourne, Attorney General; The Hon. Edmund Bartlett, Minister of Tourism; Mr. John Lynch, Chairman, Jamaica Vacations Limited; Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited; Mr. Godfrey Dyer, Chairman, Tourism Enhancement Fund and Mr. Ian Neita, Executive Director, Tourism Enhancement Fund.

The OCG's decision to copy the aforementioned persons was in keeping with its considered opinion that the matter required the attention and consideration of senior public officials who are themselves responsible for matters pertaining to accountability in public expenditure and the shaping of public policy to deal with matters of this nature.

Further, the OCG was fully aware that there is a misguided perception amongst some Public Officials/Officers that an exemption from the procurement procedures, such as is the case under review, places such contracts outside of the scrutiny of the OCG – a matter which the OCG also sought to stem in its letter of 2009 June 10 to the Permanent Secretary in the MOT.

In her response to the OCG's Requisition of 2009 June 30, Mrs. Jennifer Griffith, under cover of letter which was dated 2009 July 16, provided the OCG with the following responses:

### ***“Response to Question 1***

*Please recall that queries from the Office of the Contractor General (OCG) regarding the engagement of legal services by the Tourism Enhancement Fund (TEF) and Jamaica Vacations Limited (JAMVAC) came after the preliminary meeting with the Attorney before the terms of engagement were finalized. Since then, JAMVAC and TEF were asked to decide whether they would utilize the services of an Attorney and if yes, to formalize the process of engagement, given the Exclusion Clause under No.III in Section No. S-1000 (Page 1of 4) of the **Government of Jamaica Handbook of Public Sector Procurement Procedures, November 2008.***

- a) The Chairman and the Executive Director of the Tourism Enhancement Fund took the decision not to retain the services of an attorney and have since submitted their responses to the OCG.*

*Subsequent to the initial meeting, a formal letter of engagement dated June 8, 2009, was sent to JAMVAC by Dunn Cox. The matter was discussed at JAMVAC’s Board meeting of June 25, 2009, and a Resolution was passed for JAMVAC to retain the services of Dunn Cox under the terms and conditions outlined in the Letter of Engagement. Please see the attached Resolution and Letter of Engagement).*

- b) Please see Resolution in (a) above.*

### ***Response to Question 2***

*As indicated in (a) above, the matter has now been formalized by JAMVAC.*

### ***Response to Question 3***

*The rates are as indicated in the attached Resolution.*

#### ***Response to question to Question 4***

*Payment of the legal fees incurred will be the responsibility of JAMVAC. Please see in quotation below, advice from the Attorney General's Chambers on the matter:*

#### ***Jamaica Vacation Limited***

*“Jamaica Vacations Limited is a government company. Therefore, JAMVAC is a separate legal entity in law and its operation is governed by its incorporation documents. The Board of Directors is responsible for the management and operations of JAMVAC and they are not personally liable for same. The Board of Directors are empowered to take such actions including obtaining legal advice for any action done in good faith pertaining to discharge of their duties.”*

#### ***The Role of the Attorney General***

*“As the principal advisor to the Government, the Attorney General is obliged to provide legal services to entities within central government, that is, the ministries and departments of Government. Organizationally, neither the Fund nor JAMVAC is a part of central Government. Thus the office of the Attorney General is not mandated to provide legal services to these entities. This recognized by Ministry of Finance Circular No. 9 which requires the Attorney General's Chambers to recover some of the cost of providing legal services to statutory bodies and public companies.*

*Statutory Bodies and Government companies, subject to their own internal procurement policy procedures, are generally free to procure legal services from whomever they chose. In other words, statutory bodies and Government companies are not obliged to utilize the services of the Attorney General's Chambers. It is for the Board of the relevant entity subject to the relevant*

*procurement procedures governing that entity, to decide why, when and in what circumstances they think it is necessary to seek legal advice on an issue or procure legal services.*"<sup>90</sup>

The foregoing response from the Permanent Secretary revealed that following upon the OCG's intervention and questioning of the propriety of the retention of the services of DunnCox, the representatives of TEF opted not to retain such legal services whilst the representatives of JAMVAC regularized the engagement of the services of DunnCox, via a resolution of the Board, at its meeting of 2009 June 25.

However, the Resolution of the JAMVAC Board came some two (2) weeks after DunnCox had informed the OCG that it acted for and on behalf of JAMVAC and TEF.

The contract between DunnCox and JAMVAC was executed and signed by Mr. John Lynch on 2009 June 26.

It is important to note that prior to the regularization of the retention of the legal services of DunnCox, by JAMVAC, on 2009 June 25, JAMVAC, as at 2009 June 8, had already been charged by DunnCox, for services rendered. Such charges were duly presented and evidenced by the particulars which are contained in DunnCox's Bill #48378 that was provided to the OCG by the Permanent Secretary, MOT, under cover of letter dated 2009 November 6.

The referenced bill covered charges for the period of 2009 June 8 through to 2009 July 16 and was in the amount of \$294,144.20.

The OCG is, therefore, of the considered opinion that the contract between JAMVAC and DunnCox was both improperly and irregularly consummated given, *inter alia*, that (1) there was no Board Approval for the award of the contract at the time that DunnCox

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<sup>90</sup> Response to the OCG's requisition which was dated 2009 July 16

began representing JAMVAC nor (2) was the Permanent Secretary, the most senior and accountable officer under law, for JAMVAC, aware of the charges which would accrue, nor had such approval been granted by her and (3) services were rendered and charged by DunnCox prior to the signing of the formal contractual agreement on 2009 June 25.

It must also be noted that irrespective of any policy exemptions which might be in force, and whose strictures might waive certain procurement procedural requirements, the OCG's monitoring and Investigation of the retention of the legal services of DunnCox, pursuant to the provisions of the Contractor General Act and, in particular, Section 4 (1) thereof, has revealed irregularity and impropriety in the referenced procurement.

Further, the advice from the Attorney General's Department, regarding the seeming esoteric distinction between statutory Public Bodies and ministries and departments of central government, is not one which the OCG will readily accept in this matter given the fact that the Contractor General Act makes no distinction between such Public Bodies and the need to ensure probity, fairness, transparency, impartiality and propriety in the award of government contracts.

The OCG is of the view that any Public Body, which is expending public funds/money which rightfully belongs to the Jamaican Taxpayers, in the award of contracts, must be held fully accountable, *inter alia*, under the Contractor General Act for how those funds are expended.

It must also be noted that Section 4.6.1 of the Staff Orders for the Public Service (2004) indicates that:

***4.6.1 The advice of the Attorney General shall be sought where:***

- i) in the execution of official duties and responsibilities, a public officer is in doubt of the legal implications of any matter; or*



- ii) the interests of the Government may be compromised or jeopardized;*  
*or*  
*iii) there are indications that legal proceedings may need to be instituted against anyone; or*  
*iv) other legal services are not readily available to the Ministry or Department.*

Therefore, in keeping with the requirements of the Staff Orders, it is apparent that Public Officers, irrespective of the type of Public Body to which they are attached, should first obtain the advice of the Attorney General on legal matters.

Further, in keeping with the comments from the Attorney General's Chambers, the decision to procure legal services resides, *inter alia*, with the Board of the relevant entity. However, in the instant matter, the Board of JAMVAC did not approve the contract until after certain services were already rendered by DunnCox.

It must also be noted that throughout the conduct of the OCG's Investigation, numerous representations were made to the OCG by DunnCox, on behalf of Mr. John Lynch and Mr. Lionel Reid. The referenced representations also assisted in informing the OCG's monitoring arm of the precise nature of the services which were being rendered by DunnCox.

It is, therefore, important to note that in the latter stages of the Investigation, several simplistic questions were posed to Mr. Lynch and Mr. Reid. The responses to these questions were duly complied with and submitted to the OCG by both gentlemen, through their Attorneys-at-Law, DunnCox.

During this period, and in more than one instance, representations were made on behalf of Mr. Lionel Reid and Mr. John Lynch, by DunnCox, for extensions of time by which to respond to the OCG's Requisitions.

In one particular instance, the OCG, by way of letter which was dated 2009 September 28, requisitioned Mr. John Lynch and required him to provide “...copies of all Cabinet Submission(s) and Decision(s) regarding the Air-Lift Guarantee Agreement between JAMVAC and American Airlines”, by Monday 2009 October 5.

By way of a letter, which was dated 2009 October 1, the OCG was advised by DunnCox that “Mr. Lynch is currently off the island on business and, as a result, will not be able to complete the requisition in the requisite period. Accordingly, we are requesting a short extension to October 9, 2009 to furnish his response”<sup>91</sup>

Having been granted an extension to 2009 October 9, Mr. Lynch provided his sworn statement to the OCG under cover of a letter which was dated 2009 October 7. In his response, Mr. Lynch indicated that “All Cabinet Submissions and Decisions regarding the Air-Lift Guarantee Agreement between JAMVAC and American Airlines are in the possession of the Permanent Secretary of the Ministry of Tourism.”<sup>92</sup>

In another instance, the OCG, having been made aware of certain disclosures which were reported in the Media, as having been made at the Public Administration and Appropriations Committee of the Houses of Parliament, on 2009 October 21, issued formal Statutory Requisitions to both Mr. John Lynch and Mr. Lionel Reid on 2009 October 23.

In the referenced Requisitions of 2009 October 23, Mr. John Lynch and Mr. Lionel Reid were both required to provide responses to the following questions:

*“1. Reference is made to the OCG’s requisition that was dated May 27, 2009, in which you were asked the following question:*

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<sup>91</sup> Letter from DunnCox dated October 1, 2009 requesting an extension of time for Mr. John Lynch to provide a response to the OCG’s Requisition.

<sup>92</sup> Statement by Mr. John Lynch in response to the OCG’s Requisition which was dated 2009 September 28.

*Has any portion of the US\$4.5 Million guarantee been paid to American Airlines since the commencement of the airlift agreement? If yes, please indicate the total sums which have been paid to date and the associated shortfalls which have necessitated such payment(s).*

*In your sworn response to the OCG, which was dated July 16, 2009, you stated “No”.*

*Please indicate if American Airlines Inc. has (1) billed the Government of Jamaica (GOJ) and/or any public body or (2) called upon any portion of the US\$4.5 Million guarantee subsequent to your initial assertion that no payments had been made. If yes, please provide responses to the following questions:*

- I. Provide details of the period for which American Airlines Inc. has billed the GOJ and/or the called upon guarantee;*
- II. The routes for which the GOJ has been billed and/or the guarantee called upon;*
- III. The total dollar value of the US\$4.5 million guarantee which has been billed and/or called upon by American Airlines Inc.*
- IV. Has any payment been made to American Airlines Inc.? If yes, please state the total dollar value of the payment(s) and the date(s) on which the payment(s) was/were remitted;*
- V. Please provide particulars of the shortfall(s) which has/have necessitated American Airlines Inc. billing and/or calling upon the GOJ and/or any public body for any portion of the US\$4.5 million guarantee;*
- VI. Provide documentary evidence to support the claims and assertions which you have made.*

*Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation*

*which you are desirous of placing on record? If yes, please provide full particulars of same.”<sup>93</sup>*

The OCG’s Requisition of 2009 October 23 required both Mr. Lynch and Mr. Reid to provide responses to the OCG by 2009 October 28.

It must be noted that one (1) day prior to the deadline of 2009 October 28, the OCG received, via facsimile, a request for the extension of the deadline from 2009 October 28 to 2009 November 9. The referenced request, which came through the offices of DunnCox, advised as follows:

*“Mr. Lynch is currently off the island and Mr. Reid is currently out of town on business. Thus they will not be able to complete your requisition in the requisite period.”*

Having already been alerted by previous requests for extensions of time which were made on behalf of Mr. Lynch and Mr. Reid, and the substance of the responses which had, on prior occasions, been provided to the OCG, in regard to very short follow-up Requisitions, the Contractor General instructed that the offices of both Mr. John Lynch and Mr. Lionel Reid be contacted to ascertain the physical whereabouts of both gentlemen.

The instructions of the Contractor General were in keeping with Section 17 (1) of the Contractor General Act, which provides that:

**“A Contractor-General may adopt whatever procedure he considers appropriate to the circumstances of a, particular case and, subject to the provisions of this Act, may obtain information from such person and in such manner and make such enquiries as he thinks fit.”**

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<sup>93</sup> OCG’s Requisitions which were dated 2009 October 23, to Mr. Lynch and Mr. Reid. (See Appendix I)

It must be noted that in each and every instance, the OCG considers and responds to requests for extensions of time on a case by case basis and based upon the merit of such requests.

Upon execution of the Contractor General's instructions, by his Executive Secretary, it was confirmed that Mr. Lynch was indeed off the island whilst Mr. Reid was in official public office, albeit in Montego Bay. This finding, as regards Mr. Reid, was patently contradicted by the representation which was contained in the letter from DunnCox – the very representation upon which DunnCox's request for an extension of time was founded.

This representation, in the OCG's opinion, amounted to a scant disregard for a Judicial Investigation and was, in and of itself, a misrepresentation to a Contractor General, who, in the conduct of an Investigation, is encloded with the powers of a Judge of the Supreme Court.

Therefore, the OCG deemed the representations from DunnCox to be one of a serious import and to be manifestly disingenuous and highly contemptuous, at best.

Reproduced, herein, is an extract of an OCG Internal File Note, which encapsulates the results of the inquiry.

*"I was instructed by Mr. Christie to call and confirm if Mr. Lionel Reid, Executive Director of Jamaica Vacations Limited and Mr. John Lynch, Chairman of Jamaica Vacations Limited were in office.*

*I called the Knutsford Boulevard branch of Jamaica Vacations Limited and spoke to Ms. Geraldine Wright in Mr. Lionel Reid's office at approximately 10:10am to find out if he was in office. She informed me that he was in office yesterday (October 27<sup>th</sup>), and should be coming back tomorrow (October 29<sup>th</sup>). Ms. Wright also informed me that Mr. Reid*

*usually comes to the Kingston office whenever he is required to, however, his official office is located in Montego Bay.*

*I called the Montego Bay office of Mr. Reid at approximately 10:19am to find out if he was there. When I was transferred to his office Mr. Lionel Reid was the person who answered, as he identified himself to me. I told him I was just trying to ascertain whether or not he was at the Kingston or Montego Bay office.*

*Mr. John Lynch's office was also contacted at approximately 10:12am; I spoke to Ms. Ann-marie Buckner. I told her I was trying to confirm if Mr. Lynch was in office, she informed me that he is off the island and is expected to return tomorrow, October 29<sup>th</sup>.<sup>94</sup>*

Given the gravity of the representations which had been made to the OCG, by DunnCox, on behalf of Mr. Lynch and Mr. Reid, the OCG, by way of a letter which was dated 2009 October 28, wrote to DunnCox cautioning, warning and demanding compliance with its Requisitions of 2009 October 23, by certain stipulated deadlines.

The referenced letter to DunnCox enclosed the OCG's Internal File Note regarding the whereabouts of Mr. John Lynch and Mr. Lionel Reid.

Reproduced, hereunder, is a verbatim copy of the OCG's letter of 2009 October 28 which was written to DunnCox:

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<sup>94</sup> OCG File Note which was dated 2009 October 28 (See Appendix II)

**“URGENT AND IMMEDIATE**

October 28, 2009

Ms. Cindy Lightbourne  
Attorney-At-Law  
DunnCox  
Attorneys-At-Law  
48 Duke Street  
Kingston

Dear Ms. Lightbourne:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million**

*We write to acknowledge receipt of your letter of even date which was written on behalf of your Clients, Mr. John Lynch and Mr. Lionel Reid, and which was conveyed to the Office of the Contractor General (OCG) via facsimile a short time ago.*

*You have, on behalf of your Clients, requested an extension, to November 9, 2009, of the deadline which was previously set for your Clients to formally respond to the formal Requisitions of the OCG.*

*In your letter, you have sought to justify your request on the basis of the following representation, viz.*

*“Mr. Lynch is currently off the island on business and Mr. Reid is currently out of town on business. Thus they will not be able to complete your requisition in the requisite period.”*

*Upon the receipt of your letter, the Contractor General instructed his Executive Secretary to contact the offices of both Mr. Lynch and Mr. Reid to ascertain the physical whereabouts of Mr. Lynch and Mr. Reid.*

*We have attached, herewith, for the record and for your perusal, a copy of an Internal OCG Email File Note which was prepared by the Contractor General's Executive Secretary.*

*It is evident from the contents of the referenced File Note that the written representations which have been made by you, in so far as they relate to Mr. Reid, are, at a minimum, highly questionable. They have raised several serious questions.*

*Having regard to the circumstances, the OCG is now compelled to formally bring to your attention the following provisions of the Contractor General Act:*

1. *Section 18 (3) of the Contractor-General Act provides that "For the purposes of an Investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents".*

2. *Section 18 (2) of the Contractor-General Act provides that "... a Contractor-General may summon before him and examine on oath -*

*(a) any person who has made representations to him; or*

*(b) any officer, member or employee of a public body or any other person who, in the opinion of the, Contractor-General is able to furnish information relating to the Investigation,*

*and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act."*

*The material import of the foregoing, inter alia, is that, in the instant matter, the Contractor General is "a Judge of the Supreme Court", and you are an Officer of the Court who has made, at a minimum, highly questionable representations to the Contractor General.*



*Additionally, it is also critical that your attention is directed to the fact that any person who willfully makes any false statement to mislead, or misleads, or attempts to mislead, a Contractor General in the execution of his functions, is guilty of a criminal offence.*

*Indeed, you and your Clients may wish to be directed by the verbatim provisions of Section 29 of the Contractor General Act as follows:*

*“Every person who –*

*(a) willfully makes any false statement to mislead or misleads or attempts to mislead a Contractor-General or any other person in the execution of his functions under this Act; or*

*(b) without lawful justification or excuse –*

*i. obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or*

*ii. fails to comply with any lawful requirement of a Contractor General or any other person under this Act; or*

*(c) deals with documents, information or things mentioned in section 24 (1) in a manner inconsistent with his duty under that subsection,*

*shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.”*

*In the premises, we are now formally requiring that your Clients fully comply with the subject Requisition on or before the following specified dates and times:*

- 1. Mr. Lionel Reid – no later than 12:00 Noon, on Friday, October 30, 2009*
- 2. Mr. John Lynch – no later than 12:00 Noon, on Monday, November 2, 2009*

*Should any or both of your Clients fail to fully comply with the referenced demand, the OCG will promptly initiate all coercive and punitive measures which are available to it, under the law, to compel their compliance.*

*This will be the OCG's final demand to you and your Clients regarding this matter.*

*We sincerely trust that you and your Clients will be guided accordingly.*

*Very respectfully yours,*

*Maurice Barrett (Signed)*

*Maurice Barrett*

*Chief Investigator*

***for and on behalf of the Contractor General***

*Cc. Mr. John Lynch, Chairman of the Board, Jamaica Vacations Limited*

*Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited*

*Enclosure''*

The aforementioned letter articulated the OCG's very strong and unequivocal stance on what it considered to be a gross misrepresentation of facts by DunnCox and a deliberate attempt to mislead a Contractor General – all in violation of Section 29 of the Contractor General Act.

Despite the gravity of the misrepresentations, DunnCox, by way of letter which was dated 2009 October 28, responded to the OCG challenging the actions of the OCG and castigating the approach which was employed by the OCG in verifying the whereabouts of Mr. Lynch and Mr. Reid.

In its letter of 2009 October 28, DunnCox also accused the OCG, *inter alia*, of 'skirting ethical practice' and not giving Mr. John Lynch and Mr. Lionel Reid sufficient time within which to respond to the OCG's Requisition.

The letter, which was dated 2009 October 28, from DunnCox, indicated, *inter alia*, as follows:

*“Reference is made to yours dated October 28, 2009.*

*With regard to Mr. Reid’s whereabouts, as stated in earlier letter of the date instant Mr. Reid is in Montego Bay, as your file note reflects. Nothing about that statement is “highly questionable” or furthermore, inaccurate.*

*With regard to Mr. Lynch’s whereabouts, had your office bothered to be more thorough in its investigation, you would have learned, as we have been instructed, that Mr. Lynch, upon his return into the island on October 29, 2009 is not scheduled to come to Kingston, but rather is scheduled to stay in Montego Bay for the very short period that he will be in Jamaica.*

*It is unfortunate that your offices saw it fit to resort to such tactics by calling clients with the full knowledge that they are represented by counsel, an act which one would consider inappropriate, unacceptable, and “skating” ethical practice.*

*Further, the writer resents the questioning of her integrity with regard to the accuracy of her statements. Nothing in the writer’s letter is inaccurate or misleading and at no point in the writer’s letter did the writer indicate when either client was scheduled to return to Kingston. Your suggestions to the contrary is a most serious matter and is wholly without merit. We also find it suspect that the basis for such allegations on your part would be a file of conversations by a member of staff and not conversations had by your good self.*

*The Office of the Contractor General has submitted numerous requests to Mr. Lynch and Mr. Reid and on each and every occasion, responses have been submitted in the proper form and in the requisite time permitted by your offices.*

*Considering that both parties are required to properly research their responses and to execute affidavits to attach to their responses, it strains incredulity that you would only seek to give Mr. Reid and Mr. Lynch such a short time period (less than 4 full working days from the date delivery) within which to consult with counsel and to prepare responses to your questions.*

*Furthermore, the Contractor General Act does not specify requisite time periods within which a person must respond to a requisition of the OCG, just that they are to comply. Accordingly, a reasonable time period must be afforded considering the circumstances.*

*Accordingly, upon having an opportunity to properly research your request and to properly consult with counsel, Mr. Reid and Mr. Lynch will endeavour to remit their responses within the time allotted.”<sup>95</sup>*

The aforementioned letter signaled the genesis of a series of written exchanges and documented challenges which faced the OCG during the monitoring and Investigation of the retention of the legal services of DunnCox. The referenced letter of 2009 October 28 and the circumstances surrounding same also became the basis upon which the OCG and the Contractor General were later accused by DunnCox of acts of “*vindictiveness, ill-will, abuse of power and malice*”.

Further, the OCG, in the conduct of its Investigation into the retention of the legal services of DunnCox was also challenged by DunnCox in regard to the applicability of Section 18 of the Contractor General Act, in obtaining information regarding the contract between DunnCox and JAMVAC, as well as the OCG’s motives for copying certain pieces of correspondence to various senior public officials.

The OCG responded in writing to DunnCox’s letter of 2009 October 28, as follows:

*“October 28, 2009*

*Ms. Cindy Lightbourne*

*Attorney-At-Law*

*DunnCox*

*Attorneys-At-Law*

*48 Duke Street, Kingston*

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<sup>95</sup> Letter which was dated 2009 October 28 from DunnCox to the OCG. (See Appendix II)

Dear Ms. Lightbourne:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million**

*We write to acknowledge receipt of your letter of even date which was written in response to our faxed letter to you, also of even date.*

*We hereby, without any equivocation or reservation, repeat and restate to you the contents of our earlier letter to you.*

*Please note that your reference to Mr. Reid was as follows: “Mr. Reid is currently (i.e. today) out of town on business”. The clear implication of your letter is that Mr. Reid was/is not in office and, therefore, was/is not in a position to address matters which relate to his official functions of office.*

*However, Mr. Reid, contrary to your assertions, was, in point of fact, in his official office today – albeit not in Kingston. Additionally, he was reported to be in his Kingston office yesterday.*

*From your statements and assertions, it is also pellucidly evident that you have not taken the time to properly inform yourself of the full import of the specific provisions of the Contractor General Act to which you have been directed. That, however, is your choice and you will do so at your own peril and that of your Clients.*

*The Requisitions of the OCG are formal Statutory Requisitions and must be addressed with the expedition and seriousness which they clearly deserve.*

*Only two (2) questions were posed to your Clients. The substantive question relates specifically to an update of information, certain particulars of which your Clients have previously furnished to the OCG and in respect of which they have already, as recently as in the past week, reportedly made formal representations to the Public Administration & Appropriations Committee (PAAC) of Parliament.*

*You have already been formally advised that the OCG's demand to you and to your Clients is final.*

*Very respectfully yours,*

*Maurice Barrett (Signed)*

*Maurice Barrett*

*Chief Investigator*

***for and on behalf of the Contractor General***

*Cc. Mr. John Lynch, Chairman of the Board, Jamaica Vacations Limited*

*Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited"*

Subsequent to the exchange of correspondence between DunnCox and the OCG, on 2009 October 28, both Mr. Lynch and Mr. Reid provided responses to the OCG's Requisitions within the stipulated timelines.

However, the identical responses which were provided by both Mr. Lynch and Mr. Reid further begged the question of the need for an Attorney-at-Law, the propriety of retaining such services at the expense of the Jamaican Taxpayers and the nature of the representations which had been made to the OCG regarding the need for an extension of time.

Having been granted the extension of time, both Mr. Reid and Mr. Lynch provided responses which totaled some forty (40) words, whose equivalence amounted to a substantive 'no'.

Having regard to the compendium of facts, inclusive of the OCG's concerns and findings during its monitoring of the retention of the legal services of DunnCox, the OCG, on 2009 November 3, decided to incorporate the retention of the legal services of DunnCox as a component of its ongoing Investigation.

To be pellucidly clear, the monitoring of the contract between JAMVAC and DunnCox, which included a review of the services which had been provided by DunnCox, fortified the OCG's view regarding (1) the propriety of public officers/officials seeking legal representation from the private bar at the expense of the Jamaican Taxpayers, and (2) the need for a clearly defined policy and/or regulation to govern the circumstances under which same should be allowed.

The OCG's enquiry into the retention of the legal services of DunnCox was not spurred by JAMVAC's choice of law firms from the private bar, i.e. DunnCox, but rather the propriety of the actions of Public Officials at JAMVAC. As such, the OCG's requisitions into the matter were first directed to the Permanent Secretary in the MOT.

Accordingly, by way of letter which was dated 2009 November 3, the OCG wrote to the Permanent Secretary in the MOT, advising her of the OCG's decision to commence an Investigation and the requirement to be provided with further particulars of the contract which had been consummated between JAMVAC and DunnCox.

Reproduced, hereunder, are verbatim extracts from the letter which was written to the Permanent Secretary:

*"November 3, 2009*

*Mrs. Jennifer Griffith  
Permanent Secretary  
Ministry of Tourism  
1<sup>st</sup> & 3<sup>rd</sup> Floors  
64 Knutsford Boulevard  
Kingston 5*

*Dear Mrs. Griffith:*

**Re: Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US\$4.5 Million - Retention of Legal Services by Jamaica Vacations Limited to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General**

*We write further to the Office of the Contractor General's (OCG's) letters of June 10 and 30, 2009 and your responses thereto, which were dated June 18, 2009 and July 16, 2009, respectively, in the captioned regard.*

*More precisely, however, we write in particular regard to the OCG's ongoing Investigation into the captioned matter and the representations which have been made to the OCG by senior public officials of Jamaica Vacations Limited (JAMVAC), namely: Messrs. John Lynch, Chairman, and Lionel Reid, Executive Director, through their Attorneys-at-Law, DunnCox.*

*Consequently, this letter is written to you further to the undertaking which was given to you, by the OCG, in its letter of June 10, 2009, at which time it was expressly stated that the OCG "...has decided, inter alia, to monitor the procurement of the legal services which are being provided by DunnCox, to the named representatives of JAMVAC and TEF." As such, it is incumbent on me to inform you that the OCG has decided to include, in the captioned Investigation, matters pertaining to the retention of legal services by JAMVAC, insofar as it relates to the OCG's ongoing Investigation.*

*As you are aware, the OCG's interest, and subsequent correspondence to you in the matter emerged after having been advised by the law firm, DunnCox, by way of letter which was dated June 9, 2009, that it now acts 'for and on behalf of Jamaica Vacations Limited (JAMVAC) and the Tourist Enhancement Fund (TEF)' and that its services were "retained to assist JAMVAC and TEF with its compliance to the said requests."*

*The OCG's referenced correspondence to you, regarding the retention of the legal services by representatives of JAMVAC, emanated from its Inspectorate Division, under the signature of Mr. Craig Beresford, Senior Director, Monitoring Operations, Corporate Communications and Special Projects.*



*In June 2009, the OCG, upon realizing that legal services were purportedly 'procured' on behalf of certain representatives of JAMVAC and the Tourism Enhancement Fund (TEF), questioned, inter alia, (1) the appropriateness of same; (2) the approvals which were involved in the retention of such legal services; and (3) the associated costs of the services which were to be provided by DunnCox.*

*In the final analysis, by way of letter dated July 16, 2009, you informed the OCG that "The Chairman and Executive Director of the Tourism Enhancement Fund took the decision not to retain the services of an attorney..." Your letter of July 16, 2009 also indicated that JAMVAC, via a Resolution of the Board, formalized the retention of the legal services of DunnCox and would be responsible for the payments of the fees which would be incurred.*

*Further, in response to the OCG's interrogatories, and through documentation that was provided by you, in regard to the agreed upon rates, it was indicated, inter alia, that:*

*"IT WAS FURTHER RESOLVED that JAMVAC will duly cover the following fees arising from the retention of legal representation:*

- i. A retainer in the sum of J\$100,000.00 to meet disbursement as they arise and put towards future bills;*
- ii. The payment of Attorney's cost at an hourly rate of J\$18,000.00; with the agreement that these rates will be reviewed at the end of each year."*

*The Letter of Engagement which was signed by a Ms. Cindy Lightbourne, Attorney-at-Law, representing DunnCox and Mr. John Lynch, on June 26, 2009, indicated that "Chargeable time includes but is not limited to time spent writing letters, making or receiving telephone calls and emails, attending on you or other people in connection with the case, considering and preparing documentation, attending court, and travelling and waiting time."*

*In its correspondence of June 10 and June 30, 2009, the OCG placed upon the record its consternation regarding the retention of the legal services and "the propriety of Government accountable/accounting officers/officials and other public servants, who are requisitioned in the said capacities, to seek such legal recourse at the expense of the Jamaican Taxpayers."*

*Without prejudice to the aforementioned, and in exercising fairness to public officials/officers, the OCG also articulated that it is mindful that "... every individual has a right to obtain legal representation in any matter, if so desired..." However, the fundamental issue that was of concern to the OCG then, and even more so today, as was aptly captured in our missive of June 10, 2009 is:*

*"... not one of the public servant's right to obtaining legal representation, but rather the propriety of doing so in a matter which requires the simple disclosure of information regarding the discharge of their daily functions and responsibilities in their capacities as public servants, for matters which are related to the public body/bodies for which they are accountable.*

*The actions which have been taken by representatives of JAMVAC and TEF, and which are explicitly conveyed by the correspondence from DunnCox, begs the question as to whether or not public officials, who are accountable, both in law and administratively, for public bodies and/or agencies, can properly retain such services in the pursuit of responding to questions which are within the remit of their lawful public offices and responsibilities."*

*In the conduct of its Investigation, the OCG has received from Messrs. John Lynch and Lionel Reid, responses to its statutory requisition, through the offices of DunnCox. However, in more than one instance, the representations which have been made to the OCG, through DunnCox, has begged the question of the need for an Attorney-at-Law and whether the expense which has been placed upon the taxpayers of Jamaica can in any way be justified.*

*For information and clarity, on September 28, 2009, the OCG requisitioned Mr. Lynch, requesting that he provide "...copies of all Cabinet Submission(s) and Decision(s) regarding the Air-lift Guarantee Agreement between JAMVAC and American Airlines." Mr. Lynch was provided with an October 5, 2009 deadline by which to provide same.*

*By way of letter which was dated October 1, 2009, a Ms. Cindy Lightbourne, Attorney-at-Law, DunnCox, wrote to the OCG requesting an extension of the deadline to October 9, 2009, citing that Mr. Lynch was "...off the island on business..." In his sworn response to the OCG, which*

*was dated October 7, 2009, Mr. Lynch advised the OCG as follows: “All Cabinet Submissions and Decisions regarding the Air-Lift Guarantee Agreement between JAMVAC and American Airlines are in the possession of the Permanent Secretary of the Ministry of Tourism”*

*In another instance, the OCG, by way of letters which were dated October 23, 2009, again requisitioned Messrs. Lynch and Reid, requiring them to provide the OCG with an update regarding, inter alia, whether or not “American Airlines Inc. has (1) billed the Government of Jamaica (GOJ) and/or any public body or (2) called upon any portion of the US\$4.5 Million guarantee subsequent to your initial assertion that no payments had been made...”. In the referenced case, this was the only substantive question which was posed to both gentlemen by the OCG, and to which they were required to respond by October 29, 2009.*

*On October 28, 2009, one day prior to the submission deadline, the OCG was contacted, in writing, by DunnCox, advising, that “Mr. Lynch is currently off the island on business and Mr. Reid is currently out of town on business. Thus they will not be able to complete your requisition in the requisite period. Accordingly we are requesting a short extension to November 9, 2009...”*

*Following upon the exchange of several pieces of correspondence on October 28, 2009, in which the OCG had to caution, warn and demand compliance with the subject statutory Requisitions, the OCG, was, on October 30 and November 2, 2009, provided with responses from both Messrs. John Lynch and Lionel Reid.*

*Against this background, the OCG, upon receipt and review of the responses is left confounded by the said responses to the basic questions which were asked and what component of responding to same would have necessitated such an ‘involved’ representation from DunnCox. More so, it begs the question of the relevance of an Attorney-at-Law, in the provision of simplistic answers, at the expense of the Jamaican Taxpayers, in regard to matters for which the named individuals, who by holding their respective posts, are accountable to the very Jamaican Taxpayers.*

*The identical responses which were provided to the OCG, from Messrs. Lynch and Reid, through DunnCox, approximated forty (40) words, whose equivalence, in response to the OCG’s interrogatories, amounted to a substantive response of ‘no’ to the questions which were posed to them.*

*So that the point is not lost, the OCG, given the compendium of facts at current, is fortified in its views that there needs to some policy and/or regulation governing the circumstances under which public servants can rightfully put the Jamaican Taxpayers through such expenses.*

*Quite succinctly, the cited examples are, in the OCG's opinion, indicative of, and fraught with an apparent abuse of position and privilege of Office and the apparent scant regard for state resources coupled with a perceived contempt for accountability.*

*Further, in response to the OCG's letter of June 30, 2009, you provided to the OCG, under cover of letter which was dated July 16, 2009, the requisite information pertaining to the concerns which were raised by the OCG. Included in your response was an extract of advice which was provided by the Attorney General's Chambers regarding the circumstances under which public bodies and public servants could obtain advice from the private bar versus the Attorney General's Chambers. Same has been duly noted.*

*Whilst the OCG has noted your responses, there still remains, unanswered, fundamental questions which are germane to the principle of accountability, and which the OCG has posited in its letter of June 10, 2009, including, "Where should the line be drawn with respect to the matters which are under consideration?" The instant matter has, therefore, brought to the fore matters of national import which, for the sake of good governance, deserve the highest consideration should accountability remain an unfettered ethos of the Jamaican public sector.*

*The OCG must place upon the record that, in the conduct of approximately fifty (50) Investigations during the past four (4) years, it has requisitioned more than one hundred (100) persons for the purposes of its Investigations, inclusive of the Prime Minister, Ministers of Government, Permanent Secretaries and other senior public officials yet this is the first time in which it has been faced with a situation in which it must question the propriety of state officials/officers seeking to bill the Taxpayers for legal services in connection with the Investigation of actions of a public officer/official.*

*Having considered the import of the matter and the representations which have been made to the OCG within the past months, through DunnCox, the OCG has decided to include the retention of*

legal services, by JAMVAC, as a component of its ongoing Investigation. As such, we hereby direct your attention to the formal statutory Requisitions which are contained hereunder....

... **REQUISITIONS / QUESTIONS**

1. Please ascertain and advise of the following:

- a. An itemized listing of the fees which have been charged to JAMVAC, by DunnCox, in relation to the legal services which have been provided by DunnCox, insofar as it regards the matter under Investigation;
- b. The total fees which have been paid to date by JAMVAC insofar as it regards the matter under Investigation;
- c. The total fees which remain outstanding and payable, to date, insofar as it regards the matter under Investigation.

Please provide documentary evidence, where possible, in support of your response and any assertions made.

2. Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same...<sup>96</sup>

In her sworn response to the OCG's Requisition, which was dated 2009 November 6, Mrs. Griffith advised the OCG as follows:

“RESPONSES TO QUESTIONS

1. Please ascertain and advise of the following:

- a. An itemized listing of the fees which have been charged to JAMVAC, by DunnCox, in relation to the legal services which have been provided by DunnCox,

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<sup>96</sup> Requisition to Mrs. Jennifer Griffith dated 2009 November 3.

*insofar as it regards the matter under Investigation;*

*b. The total fees which have been paid to date by JAMV AC insofar as it regards the matter under Investigation;*

*c. The total fees which remain outstanding and payable to date, insofar as it regards the matter under Investigation.*

*Responses:*

*a. Attached hereto are the following:*

*Letter from DunnCox dated June 8, 2009, setting out the terms and conditions of the agreement including fee structure, and the request for payment of \$1 00,000.00 for retainer fees.*

*Letter of August 11, 2009 with attaching invoice for work done up to July 16, 2009 (Invoiced amount \$294,144.20).*

*b. The total paid to date is two hundred and ninety four thousand, one hundred and forty four dollars and twenty cents (\$294,144.20). (Please note that the amount of the retainer fee of \$100,000 was deducted from the total of the invoice of \$294,144.20 and the difference of \$194,144.20 paid on cheque #3909085).*

<i>- cheque #3909032</i>	<i>\$100,000.00</i>
<i>- cheque #3909085</i>	<i>\$194,144.20</i>
<i>TOTAL</i>	<i>\$294,144.20</i>

*c. The letters noted at response 'la' reflect the only charges, to date, indicated to and paid by JAMV AC in the matter in which DunnCox is representing JAMVAC. The invoice of August 11, 2009 is for work done up to July 16, 2009.*

*Please provide documentary evidence, where possible, in support of your responses and any assertions made.*

*Documentary evidence attached includes:*

- Copy of Letter dated June 8, 2009 - Doc. A.*
- Copy of Letter and Invoice dated August 11, 2009 - Doc. B.*
- Copies of negotiated cheques supporting payments indicated - Doc. C.*

*2. Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide particulars of same.*

*Response:*

*No.*<sup>97</sup>

According to the information which was provided by the Permanent Secretary, in and under cover of letter which was dated 2009 November 6, JAMVAC had been billed by DunnCox for services rendered up to 2009 July 16, in the sum of \$294,144.20.

The information which was provided by the Permanent Secretary did not cover the full period for which DunnCox had been providing services to JAMVAC and of which the OCG was aware. Consequently, the OCG, by way of a letter which was dated 2009 November 10, directed a written Statutory Requisition to DunnCox seeking to obtain the information which had not been provided by the Permanent Secretary.

DunnCox was, therefore, requisitioned in its capacity as the beneficiary of a Government of Jamaica contract, i.e. as a Government of Jamaica Contractor, and was required to respond to and provide the OCG with the following particulars:

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<sup>97</sup> Sworn Response from Mrs. Jennifer Griffith dated 2009 November 6 (See Appendix I)

1. *“Please ascertain and provide responses to the following questions:*

a. *Provide an itemized listing of all fees which have been charged to JAMVAC, by DunnCox, in relation to the legal services which have been provided for matters which relate to the OCG’s ongoing Investigation. The list must include all services rendered, up to and including November 6, 2009, and should include the following:*

- i. A detailed description of services which have been rendered;*
- ii. The date(s) on which the listed service(s) were rendered;*
- iii. The cost(s) that are associated with each of the listed services which were rendered;*
- iv. A copy of the invoice which was submitted to/or is to be submitted to JAMVAC in support of the fees paid and/or payable.*

*Please provide documentary evidence, where possible, in support of your response and any assertions made.*

b. *Please indicate the total fees which have been paid to date by JAMVAC insofar as it regards the matter under Investigation;*

c. *The total fees which remain outstanding and payable by JAMVAC, up to November 6, 2009, in respect of the matter which is under Investigation. The response must include the following:*

- i. A detailed description of the services which have been rendered;*
- ii. The date(s) on which the listed service(s) were rendered;*
- iii. The cost(s) that are associated with each of the listed services which were rendered;*
- iv. A copy of the invoice which was submitted to/or is to be submitted to*



*JAMVAC in support of the fees paid and/or payable.*

*Please provide documentary evidence, where possible, in support of your response and any assertions made.*

- 2. Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same.*

*It is of particular import that we bring your attention to the fact that the Ministry of Tourism (MOT), through its Permanent Secretary, Mrs. Jennifer Griffith, has already provided the OCG with particulars of the government contract which was executed between JAMVAC and DunnCox.*

*In the instant case, the MOT, by way of letter dated November 6, 2009, has provided the OCG with particulars of the fees which have been charged by DunnCox up to July 16, 2009. Therefore, the Requisition which is made of you requires that the information be made current, to include fees incurred up to November 6, 2009, and that the services rendered and associated fees are disaggregated.*

*By copy of this letter, the relevant state authorities and government officials, inclusive of the Accounting and Accountable Officers of JAMVAC, the Public Body which has awarded the referenced contract to DunnCox, are hereby informed of the OCG's requirements of you in respect of the formal provision of information which relates to the retention of the legal services of DunnCox."<sup>98</sup>*

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<sup>98</sup> OCG Requisition to DunnCox dated 2009 November 10 (See Appendix II)

By way of letter which was dated 2009 November 13, DunnCox wrote to the OCG advising, *inter alia*, that it would be unable to provide a response to the OCG's Requisitions without first obtaining approval from Mr. John Lynch and Mr. Lionel Reid, its Clients. This, as stated by DunnCox, was due to the lawful obligations of Attorney/Client privilege.<sup>99</sup>

In addition, the referenced letter from DunnCox further questioned, *inter alia*, the OCG's rationale for including the retention of the legal services which were rendered by DunnCox as a component of its Investigation and stated, *inter alia*, that compliance with the OCG's request would place DunnCox in the "*invidious position of breaching attorney/client privilege.*"

It is also the case that, in its letter of 2009 November 13, DunnCox apparently failed to fully appreciate the distinction between the OCG's Investigation into the US\$4.5 Million American Airlines Airlift Guarantee Deal and the OCG's Investigation into the retention of legal services by JAMVAC.

Instead, the law firm indicated that DunnCox had nothing to do with the American Airlines Airlift Guarantee Deal and as such described the OCG's decision to include in its main Investigation matters pertaining to the retention of legal services by JAMVAC as "*overreaching and misconceived*".

DunnCox, in its letter of 2009 November 13, repeatedly requested that the OCG provide the basis/rationale upon which it was investigating the retention of the legal services of DunnCox and sought to direct the OCG's attention to the following documentation:

1. Regulation (4) (1) (g) of the Public Sector Procurement Regulations 2008 which excludes legal services for non-routine assignments and litigations from the procurement procedures;

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<sup>99</sup>Letter from DunnCox dated 2009 November 13. (See Appendix II)

2. Circular # 35 from the Ministry of Finance and the Public Service; and
3. A letter from the Hon. Minister of Justice and Attorney General to the Chairman of the General Legal Council, advising that non-routine legal services were exempt from the procurement guidelines.

The above referenced matters were, from the very outset of the OCG's monitoring, already taken into consideration by the OCG. However, DunnCox failed to realize and/or appreciate the fact that contractual services which are exempted from the procurement procedures are not removed from the purview of the Contractor General Act. Consequently, the OCG retains the lawful authority to monitor, enquire into or investigate such contracts as it deems fit.

Reproduced, hereunder, is a verbatim extract of the 2009 November 13 letter from DunnCox:

*"We acknowledge receipt of your letter dated November 10, 2009 wherein you (inter alia) make certain requisitions of this firm, which requisitions are set out on pages 5 and 6 of your letter.*

*DunnCox is willing to cooperate with the Office of the Contractor General and we are ever mindful of the provisions of the Contractor General Act as well as the various powers, duties and responsibilities attendant with the Office of the Contractor General. We stand willing to comply with all valid, reasonable and lawful requisitions of your good office.*

*In relation to the requisitions/questions in your November 10<sup>th</sup> letter, we set out our initial responses thereto as follows:*

1. *As you are aware, we have provided legal services from June 2009 to Jamaica Vacations Limited (JAMVAC) based upon a very specific retainer, that is, to*

*assist JAMVAC with its compliance with the various requests to it by your office as regards the alleged American Airlines Air Lift Guarantee for US\$4.5 Million matter. As Attorneys-at-Law, we have legally binding professional duties to our clients which constrains us from disclosing any information to third parties (including the Office of the Contractor General) without our Client's written consent first had and obtained. We are certain you appreciate that legal professional privilege attaches to all correspondence and documentation between DunnCox and our clients and, generally, the sanctity of such privilege remains paramount in our jurisdiction. Therefore, before we can even consider responding to your request, we will firstly have to discuss your request with our Client who will instruct if they are willing to waive legal privilege to facilitate our releasing information to you as requested. We are in the process of doing this. Should we be provided with such waiver of privilege, we may then be in a position to respond further to your requisitions.*

- 2. We note that your November 10, 2009 letter makes reference to our letter of June 9, 2009 to the Office of the Contractor General wherein we advised your office (inter alia) that we act for and on behalf of JAMVAC and that our services were retained by our Client to assist them with their fulsome compliance to your formal requisitions pertaining to the American Airlines Air Lift Guarantee for US\$4.5 Million. Your November 10<sup>th</sup> letter also makes reference to the fact that you are already in possession of our engagement letter with our Client dated June 8, 2009 as well as a copy of our first invoice dated the August 3, 2009 for services rendered to our Client. Based on the aforesaid, if the correspondence in your possession is carefully reviewed, you must be fully aware and appreciate that the scope of our retainer is very limited and had absolutely nothing to do with the entering into or operation of the alleged American Airline Airlift Guarantee Deal for US\$4.5 Million itself (which, as we understand, is the subject of your Investigations). Our retainer remains very limited to providing services to our Client in formulating and providing responses to your requisitions for*

*information and documentation to be supplied pursuant to the Contractor General Act. Our understanding is that to date all requisitions from your office have been fully answered and (we trust) satisfied. Our retainer never extended to nor were we at any time involved with or instructed by JAMVAC or any other entity in relation to the entering into or operation of the alleged American Airlines Air-Lift Guarantee Deal for US\$4.5 Million. Based on the above, the decision of your office to now expand your captioned Investigations to “include” in your Investigations and enquiry into the alleged American Airlines Air-Lift Guarantee Deal for US\$4.5M “contractual matters pertaining to the retention of legal services by JAMVAC, insofar as they relate to the OCG’s on-going Investigation” are, in our opinion overreaching and misconceived. DunnCox had absolutely nothing to do with the alleged American Airlines Air-Lift Guarantee Deal for US\$4.5M and as such we are unable to assist with the on-going Investigations of the Office of the Contractor General upon and in relation to that matter.*

- 3. Generally, we must comment adversely on the attempt by your good office to cast a wide net by expanding your Investigation without properly substantiating or even offering a reasonable basis for your so doing, particularly when the immediate effect of any compliance with your requisition would place us in the invidious position of breaching attorney/client privilege.*
  
- 4. You have advised that you have already received from the Ministry of Tourism copies of the “particulars of the Government contract that was executed between JAMVAC and DunnCox” (which we presume is a reference to our engagement letter) and you indicate that you have to hand particulars of the fees which were charged by DunnCox up to July 16, 2009. You therefore have in your possession all documentation pertaining to the engagement of DunnCox’s services and all bills or invoices which have been issued by DunnCox to JAMVAC pertaining to the abovecaptioned matter. As we have indicated to you, in relation to your*

*requisitions up to November 6, 2009, we require our client's written authorization.*

- 5. Kindly clarify for us the basis/rationale on which your office has decided to include in its Investigations into the alleged American Air-Lift Guarantee Deal for US\$4.5M contractual matters pertaining to the retention of in June 2009 of non-routine legal services by JAMVAC to assist it in responding to and complying with the requests of the Office of the Contractor- General. We fail to see how our engagement and/or provision of these services are related to the Investigation of the alleged American Airlines Air-Lift Guarantee deal for US\$4.5 milion, We will appreciate your clarification as to why this information is sought.*
  
- 6. Could you kindly clarify for us the basis/rationale on which your office has decided to include in its captioned Investigation contractual matters pertaining to the retention of legal services by JAMVAC as regards our Clients seeking the services of DunnCox?We fail to see how our engagement and/or provision of these services are related to the Investigation of the alleged American Airlines Air-Lift Guarantee deal of US\$4.5 million. We will appreciate your clarification as to why this information is sought. In the interim, and in the event your requisitions pertain to the procurement of legal services, we direct your attention to Regulation 4 (1) (g) of the Public Sector Procurement Regulations 2008 under the Contractor- General Act, Dated December 12, 2008, Circular No. 35 dated the 22<sup>nd</sup> day of September, 2008 from the Ministry of Finance and the Public Service as well as letter dated September 30, 2009 from Honourable Minister of Justice and Attorney General to the Chairman of the General Legal Council advising of procurement guidelines for legal Services by GOJ entities which all, inter alia, make it clear that legal services for non-routine legal assignments are exempted from procurement procedures.*

7. *Based on the above we are compelled to advise that it may not be possible to answer your requisitions (or even be in a position to so do), much less by the deadline of Monday November 16, 2009 which has been unilaterally imposed.*

*We stand willing to meet with you as regards the above issues and your requisition (subject to client instruction) and, in the interim look forward to your full consideration and early response to the various issues raised herein by us.*<sup>100</sup>

Due to the issues which were raised in the 2009 November 13 letter from DunnCox, the OCG, by way of letter which was dated 2009 November 16, deemed it necessary and appropriate to advise DunnCox, *inter alia*, that *“With the deepest of respect, your assertions and questions would suggest that either you have not read the Contractor General Act or, if you have read it, you are not in agreement with its provisions. We have been cautiously persuaded towards this view, as we are reluctant to accept that you have read the Act but are incapable of understanding what you have read.”*

The OCG’s letter of 2009 November 16 in many instances directed DunnCox to various provisions of the Contractor General Act and outlined the supremacy of an Act of Parliament over a Statutory Regulation – that is to say that the Contractor General Act is in no way fettered by the exemptions which were contained in the Procurement Regulations and/or Circular #35 from the Ministry of Finance and the Public Service.

On the matter of Attorney/Client privilege, the OCG also advised DunnCox that *“... if your proposition is taken to its logical conclusion, then what you are in fact saying is that Mr. John Lynch and Mr. Lionel Reid, who are public servants, can lawfully withhold the permission which you say you are seeking from them and, by so doing, effectively conceal from the OCG, and from the Jamaican Public, just how much of the Taxpayers’ money is being spent by them with you and for what.*

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<sup>100</sup> Letter from DunnCox which was dated 2009 November 13 (See Appendix II)

*The OCG is not entirely certain if this is the sort of argument that you or your Clients, or your Clients' superiors, are prepared to publicly advance and defend."*

Further, in its response of 2009 November 16, the OCG also advised DunnCox, *inter alia*, that *"It is a matter in respect of which your Clients, who are public servants and/or public bodies, are paid and/or funded by the Jamaican Taxpayer. They are publicly accountable under law for what they do in the discharge of their public functions and, in particular, what they do in their expenditure of public funds.*

*The matter before us is also one in respect of which a private law firm, DunnCox, has been awarded a "Government contract within the meaning of Section 2 of the Contractor General Act.*

*In consequence, DunnCox, whose fees are now being paid out of public funds, is also accountable under the law to the OCG for its implementation and performance of the referenced contract. I can understand your discomfort about this, but you should appreciate that even law firms are bound by the duly promulgated laws of the Parliament of Jamaica.*

*It is critically important that neither you nor your Clients should lose sight of these pivotal and determinant circumstances, lest you do so to your detriment."<sup>101</sup>*

The unique element of the OCG's enquiry is one in which a Government Contractor sought to obstruct the OCG's Investigation by claiming Attorney/Client privilege, albeit in a matter in which the only requirement made was for a disclosure of the contractual duties which were performed by DunnCox under the contract and the rates which were associated with same.

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<sup>101</sup> Refer to letter from the OCG to DunnCox dated 2009 November 16 (See Appendix II)



Further to the aforementioned, on Wednesday, 2009 November 18, DunnCox complied with the OCG's Statutory Requisition and provided a response to the OCG in regard to the charges which had been incurred. In its letter of 2009 November 18, complete with a duly executed Voluntary Declaration, DunnCox advised the OCG, *inter alia*, as follows:

1. *"...As the Office of the Contractor General is in possession of our Statement of Charges dated August 3, 2009 for the period June 8, 2009 to July 16, 2009, the following is a listing of the services rendered from July 17, 2009 to November 6, 2009...*

- *...The total fees associated with the aforementioned charges are as follows:*

*Attorney's Fees: \$147,780.00*

- *The Cost of each service is determinate upon the time necessary to complete the task. We bill in ten-minute increments.*
- *No Statement of Charges has been submitted to JAMVAC save and except that dated August 3, 2009 which is in your possession.*

*b. ...To date, JAMVAC has paid DunnCox the sum of \$294,144.20.*

*c. ... At present no fees remain outstanding and/or payable.*"<sup>102</sup>

Therefore, based upon DunnCox's sworn statements, between the period of 2009 July 17 and 2009 November 6, JAMVAC incurred expenses in the sum of J\$147,780.00 for legal services which were provided by DunnCox. This cost, in the OCG's opinion, cannot be rightfully justified.

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<sup>102</sup> DunnCox's response to the OCG's Requisition. 2009 November 18 (See Appendix II)

In addition to the above referenced response, DunnCox, in its cover letter of 2009 November 18 also advised the OCG as follows:

*“We acknowledge receipt of yours dated November 16, 2009, the contents of which are duly noted, but respectfully disagree with certain assertion therein.*

*As we indicated in our letter dated November 13, 2009 in order for us to respond to your requisitions we are duty bound to first obtain our client’s written instructions so to do. We have now received our client’s instructions to provide you with the responses to the requisitions in your aforesaid letter.*

*Based solely on our client’s instructions, please find enclosed herewith:*

- 1. Responses of Hyacinth Lightbourne in response to the requisitions dated November 10, 2009 by the Office of the Contractor General regarding American Airlines Air-Lift Agreement; and*
- 2. Form of Voluntary Declarations duly executed by Hyacinth Lightbourne.*

*It is important for you to realize that we continue to stand by the positions set out in our letter dated November 13, 2009 (inter alia) relating to legal professional privilege. Therefore, our response to your requisitions must not be construed as a departure from our correctly stated positions as set out in our letter dated November 13, 2009.*

*As a separate issue, we reserve all rights pertaining to the issues raised in our letter of November 13, 2009 (particularly the general principles as regards legal professional privilege and the exemption from the procurement process of non-routine legal services) which we trust you will agree is generally of such importance that we should deal fully with this issue at another time and perhaps in another forum.*

*We trust the attached responses satisfy your requisitions and we reiterate our commitment to work with assist the Contractor General in the proper discharge of the rights, duties and obligations of that office.*”<sup>103</sup>

The above referenced letter again challenged the legal authority of the OCG to request documentation pertaining to a Government contract from, the offices of an Attorney-at-Law, who, in the instant matter, was also a Government Contractor.

In particular, the letter from DunnCox and its reference to Attorney/Client privilege has brought into sharp focus the provisions which are contained in Section 18 (4) of the Contractor General Act, Parliament’s intent in relation thereto and their applicability to matters which are deemed secret and confidential.

For clarity, Section 18 (4) of the Contractor-General Act provides as follows:

**“Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person and by or under the Official Secrets Act, 1911 to 1939 of the United Kingdom (or any Act of the Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any other law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor-General for the purpose of an Investigation; and accordingly, no person shall be liable to prosecution by reason only of his compliance with a requirement of the Contractor-General under this section.”** (OCG Emphasis)

In the instant matter, the OCG’s rationale and authority to request the said information has also been shrouded in the penumbra of the application and interpretation of the exemption which was granted for the contracting of non-routine legal services by Public Bodies.

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<sup>103</sup> Letter from DunnCox to the OCG which was dated 2009 November 18

In acknowledging the receipt of DunnCox's response to the OCG's Requisition, the OCG, by way of letter which was dated 2009 November 19, advised DunnCox, *inter alia*, that in couching its response it is "...*apparent that you have still not grasped the full import of the provisions of the Contractor General Act...*".<sup>104</sup>

In its letter of 2009 November 19 the OCG also asserted that "...*it is important for you to be aware that should DunnCox, in the future, become the subject of the OCG's attention under the Contractor General Act, the positions which were conveyed by us, to you, in our letter of November 16, 2009, will be fully enforced against you without condition.*"

Whilst the OCG is appreciative of the apprehensive on the part of DunnCox as it regards breaching Attorney/Client privilege, the OCG is of the unwavering belief that the law must be properly interpreted, applied and fully enforced. Whilst DunnCox was of the view that Section 18 (4) did not apply or supersede the obligations of 'privilege', the OCG is also cognizant of the fact that there are other statutes in Jamaican Law which, though worded differently, are themselves unambiguous in intent as regards the waiving of the Attorney/ Client privilege.

In point of fact, the Child Care and Protection Act (2004) is one such statute which overcomes Attorney/ Client Privilege.

Section 6 (2), (3) and (9) of the Child Care and Protection Act provides as follows:

*"(2) Any person who has information which causes that person to suspect that a child-*

*(a) has been, is being or is likely to be, abandoned, neglected or, physically or sexually ill-treated; or*

*(b) is otherwise in need of care and protection, shall make a report to the Registry.*

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<sup>104</sup> OCG letter to DunnCox which was dated 2009 November 19.

*(3) A prescribed person who, in the discharge of that person's duties, acquires information that ought reasonably to cause that person to suspect that a child-*

*(a) has been, is being or is likely to be, abandoned, neglected or, physically or sexually ill-treated; or*

*(b) is otherwise in need of care and protection, shall make a report to the Registry in accordance with the provisions of this section.*

*(9) Subsection (2) or (3) applies even if the information on which the belief is based-*

*(a) is privileged as a result of a relationship of attorney-at-law and client; or*

*(b) is confidential,*

*unless there is no substantial risk that the welfare of the child will be further endangered.”*

Therefore, Jamaican law, as it currently exists on the statute books, has already embraced the principle of jettisoning Attorney/Client privilege in the quest for achieving the greater good in the public interest and in respect matters which hold serious societal import.

This is an important feature of Jamaican law which may have been overlooked by DunnCox but which, in the OCG's opinion, ought not to be readily overlooked or ignored, particularly when the issue at hand is a Government contract which has been awarded by a Public Body to a law firm such that the law firm becomes a Government contractor and, consequently, is obliged to render a service to the Public Body in return for compensation which is to be paid for by the Taxpayers and People of Jamaica.

If these are the circumstances of the case, then on what credible or logical basis can an argument be properly advanced by any law firm that the independent Commission of the Parliament of Jamaica which was established by statute to monitor and to investigate such contracts – to ensure probity, propriety, transparency, accountability, competition and value for money in the expenditure of Taxpayer funds, and which is encloded with

the powers of a Judge of the Supreme Court of Jamaica – should be barred from enquiring into said contracts merely because the Government contractor in question is a law firm?

### *Challenges to the OCG's Statutory Authority and Credibility*

Following upon the receipt of DunnCox's response to the OCG's Requisition of 2009 November 10, the OCG was presented with a 2009 December 10 letter from DunnCox which, in the main, questioned the OCG's integrity and imputed retribution and a vindictive motive for launching an Investigation into the retention of the legal services of DunnCox.<sup>105</sup>

In its letter of 2009 December 10, DunnCox outlined three main arguments which, in the OCG's opinion, amounted to a documented assault on the OCG and the Contractor General. In so doing, DunnCox accused the OCG, *inter alia*, of an abuse of power which was driven by an ill intent towards the law firm.

In the first instance, DunnCox's main argument centered around the OCG's interpretation of Section 18 (4) of the Contractor General Act and the OCG's insistence that DunnCox should provide the OCG with the requested information. Essentially, DunnCox informed the OCG that the OCG's belief that Section 18 (4) of the Contractor General Act could override Attorney/Client privilege was inaccurate ill-founded.

In presenting its arguments, DunnCox accused the OCG of failing to cite Section 18 (5) of the Contractor General Act which provides that:

*"No person shall, for the purpose of an Investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law."*

This provision, in the opinion of DunnCox, was sufficient to cover legal professional privilege. However, the OCG does not share DunnCox's view which, in the OCG's

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<sup>105</sup> Letter from DunnCox to the OCG which was dated 2009 December 10 (See Appendix II)

considered opinion, represents a strained interpretation of Section 18 of the Contractor General Act.

DunnCox further cited specific cases and legal opinions which, *inter alia*, spoke to the fact that legal professional privilege is deemed sacrosanct and that the courts will curtail or abolish the privilege “*whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation.*”

These cases, in the OCG’s opinion only served to strengthen the OCG’s view that Section 18 (4) of the Contractor General Act was in fact applicable and superseded Attorney/Client privilege. In point of fact, should DunnCox’s reasoning be taken to its logical conclusion, then the Contractor General would have no jurisdiction whatsoever in contractual matters between a Public Body and any Attorney-at-Law or law firm which has been awarded a Government contract.

Further, Section 18 (4) of the Contractor General Act contains no ambiguities and is written in very clear and expressed language, thereby removing any equivocity which would reasonably restrict its applicability to the disclosure of information to the OCG.

In its letter of 2009 December 10, DunnCox questioned the actions of the Contractor General and disputed “*the motives of the OCG’s Investigation of our retention*”. In so doing, DunnCox cited, *inter alia*, the following:

1. The basis upon which the OCG started the Investigation;
2. The letter from the Ministry of Justice to the Chairman of the Legal Council, Circular # 35 from the Ministry of Finance and the Public Service and the 2008 December Procurement regulations which all articulated that non-routine legal services were exempt from the procurement guidelines;





By way of letter which was dated 2009 December 14, the OCG posited its response to DunnCox and provided the law firm with details of the incontrovertible facts which would clarify the record and disabuse it of the opinion that the OCG's Investigation of the matter was driven by anything other than "*a sound concern that impropriety has occurred.*"

In its letter of 2009 December 14, the OCG also required that DunnCox provide a written apology retracting the accusations and that such an apology should be copied to all of the persons to whom DunnCox's letter of 2009 December 10 had been copied.

Accordingly, detailed below is the OCG verbatim response to the accusations and charges which were levied by DunnCox in its letter of 2009 December 10:

"VERY URGENT

*2009 December 14*

*DunnCox  
Attorneys-At-Law  
P.O. Box 365  
48 Duke Street  
Kingston  
Jamaica, W.I.*

*Attention: Mr. Lincoln Eatmon, Esq., Senior Partner*

*Dear Sirs:*

*Re: Request for Apology and Withdrawal of Defamatory Statements Made Against the Contractor General and the Office of the Contractor General – In the Matter of the Retention of Legal Services by Jamaica Vacations Limited (JAMVAC) to Provide Responses to the OCG's Formal*

Requisitions for Information and Documentation to be Supplied under the Contractor General Act

*We write to acknowledge our receipt of your letter dated 2009 December 10, which was received in the Office of the Contractor General (OCG) on Friday, 2009 December 11. We also write further to and in confirmation of a teleconference which was conducted between our respective offices (Greg Christie/Chris Bovell/Maurice Barrett) shortly after the OCG's receipt of the referenced correspondence on Friday afternoon at 3:00 PM.*

*Your missive of the 10<sup>th</sup> instant contains certain expressed opinions and unequivocal statements which warrant the OCG's reiteration of its previously articulated positions as well as the conveyance of certain material facts to your knowledge. Facts, which, based upon the content of your letter, it is apparent that you were not fully apprised of at the time of your drafting of the referenced letter.*

*The elucidation of the referenced documented facts will, beyond doubt, render your bold and unequivocally expressed statements which have attributed to the OCG an act of 'retribution', an attempt to malign the good name of DunnCox and the consequent alleged "abuse of power" by the Contractor General and the OCG, to be baseless and, indeed, bordering upon recklessness and lending itself to being libelous.*

*We will, therefore, address the content of your letter based upon the three (3) main issues which it seeks to convey, inclusive of your assertion that the OCG has overlooked and/or ignored certain aspects of the law. As such, detailed hereunder are our responses thereto:*

Legal Professional Privilege

*We must thank you for the extensive research which you have undertaken regarding the application of Section 18 of the Contractor General Act to the legal professional privilege which exists between Attorneys-at-Law and their Clients.*

*Section 18 of the Contractor General Act is, in fact, a very unique provision of the statute, which, quite understandably, brings about an appreciable apprehensiveness regarding its applicability.*

*We must, however, respectfully advise that we do not share the opinion which has been proffered by your goodly offices.*

*In the instant matter, and using the very cases and legal arguments which have been advanced by you, we must highlight the following which, in the OCG's view, fully supports the OCG's positions:*

- a. Legal professional privilege is deemed sacrosanct. **However, "the privilege can be abolished or curtailed by statute by clear and express language or necessary implication"**. For the avoidance of doubt, we have stated hereunder the provisions which are contained in Section 18(4) of the Contractor General Act as follows:*

***"Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person under the Official Secrets Act, 1911 to 1939 of the UK (or of any Act of Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor General for the purpose of an Investigation ..."***

- b. The courts will curtail or abolish the privilege **"whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation"**.*

*A careful reading of the Contractor General Act, and in particular Section 18 of the Act, will reveal that there is no ambiguity in Section 18(4) of the Contractor General Act. Further, it is the OCG's considered view that Sections 18(1), 18(2), 18(4) and 18(5) of the Contractor General Act, both in terms of the language employed and their expressed intent, do not support the argument which is being posited by you, particularly having regard to the peculiar **public interest** circumstances which lie at the very foundation of this matter.*

***Further, in the instant matter, the OCG's Requisition to DunnCox, which was dated 2009 November 10, required you solely to provide an itemized and disaggregated listing and details***

of the charges which had been billed and/or which were billable to and payable by Jamaica Vacations Limited (JAMVAC) in respect of legal services which were rendered by DunnCox in respect of matters which related specifically to the Government contract which was consummated between JAMVAC and DunnCox. In particular, the matters were related to the expenditure of public funds by your Clients, who, in respect of all of the material issues which are under consideration, were public servants acting at all material times in the discharge of their public functions.

Further, and despite the fact that it is the OCG's contention that Section 18 of the Contractor General Act overrides the Attorney/Client privilege which is the subject of this matter, it must nevertheless be further emphasized that the OCG's Requisition of DunnCox did not in any way require DunnCox to divulge the nature and/or content of the Attorney/Client disclosures which had taken place between DunnCox and Mr. John Lynch and/or Mr. Lionel Reid nor the particulars of any professional advice which was given by DunnCox to Mr. John Lynch and/or Mr. Lionel Reid.

The Actions of the Contractor General

Page four (4) of your letter states that whilst you do not question the OCG's statutory authority to monitor the award and/or termination of Government contracts, you have nonetheless deemed it necessary to dispute the motives of the OCG's Investigation of the procurement, by JAMVAC, of legal services from DunnCox or, for that matter, from any other attorney, in this matter.

In pursuit of your argument, you have advanced five (5) justifications. Based thereupon, you have concluded that the OCG's decision "to investigate (DunnCox's) retention was done purely as an act of retribution rather than upon any sound concern that impropriety has occurred. Such conduct is an abuse of power."

The reasons which have been put forward by you include:

- (1) The basis of the OCG's Investigation, as was stated in the OCG's letter to you of 2009 November 10;
- (2) The fact that "legal services for non-routine assignments and litigations are exempt from the public procedure handbook."

- (3) *DunnCox advising the OCG, by way of letter dated 2009 June 9, that it acted for and on behalf of JAMVAC;*
- (4) *The fact that the OCG was already in possession of DunnCox's letter of engagement. Further, that DunnCox played no part in the American Airlines Guarantee Deal which was executed in 2008 August; and*
- (5) *That the OCG's Investigation of DunnCox's retention only commenced upon the heels of your Ms. Cindy Lightbourne's characterizing the OCG's actions of 2009 October 28, in a letter of the same date, as "inappropriate, unacceptable and skating ethical practice."*

*First, we must inform you that in its conduct of any Investigation under the Contractor General Act, the OCG is not compelled to provide you or any person with full or any particulars of its reasons for launching its Investigation. As rightly stated, the OCG has offered DunnCox no other reason other than that which was documented in the OCG's letter of 2009 November 10.*

*Second, non-routine legal services are in point of fact exempt from the procurement guidelines. However, they are by no means removed from the purview of the expressed oversight statutory monitoring and investigative jurisdiction of a Contractor General under Sections 2, 4, 15, 16, 17 and 18 of the Contractor General Act. This is a fact which, it appears, you are prepared to continue to overlook.*

*In the circumstances, we should place upon the record the fact that by way of letter, dated 2009 November 5, addressed to the Financial Secretary and the Learned Attorney General, and copied to the Chairman of the General Legal Council (GLC), the Government of Jamaica and the GLC were formally advised of the OCG's positions as above.*

*You should be further aware that, by way of letter, dated 2009 November 12, which was received by the OCG on 2009 December 2, the Chairman of the GLC wrote to the OCG advising it, inter alia, in the following terms: "**The General Legal Council fully supports the principle that all government contracts be awarded impartially and on merit. It is clearly the responsibility of all Public Bodies to ensure that the awards are properly made and as it is for all clients (of attorneys) to ensure that the fees charged are fair and reasonable**".*

Thirdly, the OCG has been aware, and was so advised, that DunnCox was acting for JAMVAC since 2009 June 9 – a fact which it does not dispute. Further, the OCG acknowledges that DunnCox was not involved in the American Airlines Guarantee Deal – another statement of fact.

Lastly, and quite importantly, your concluding reason states that the OCG's Investigation commenced post 2009 October 28 – another statement of fact. However, DunnCox, in imputing motive, has erred by ascribing an act of “retribution” and “an abuse of power” to the instigation of the OCG's Investigation. These reasons, quite unfortunately, are grounded in DunnCox's ignorance of the facts which led to the OCG's inclusion, in its Investigation, of the matter regarding JAMVAC's retention of DunnCox for the provision of legal services.

**The OCG's Investigation of the American Airlines Guarantee Deal, and the retention by JAMVAC of the legal services of DunnCox, are two separate issues which have become inextricably intertwined and, which, for the record, have been the documented subject of the OCG's formal monitoring jurisdiction and attention, under the Contractor General Act, since 2009 June 10 – and not since 2009 November 10 as your letter has erroneously asserted.**

With the aforementioned stated, we must now respectfully advise you of the following pieces of documented correspondence which will unequivocally contradict your unfortunate and unfounded assertions that the OCG's Investigation in the matter regarding JAMVAC's retention of your services (a) was actuated by malice on the part of the OCG against DunnCox, (b) is an act of “retribution” against DunnCox and, (c) consequently constitutes “an abuse of power” on the part of the Contractor General and the OCG.

- (1) Letter from the OCG to Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism, dated 2009 June 10, advising her of the OCG's intent, inter alia, to monitor the contract between DunnCox and JAMVAC and questioning the propriety of the actions of representatives of JAMVAC and the Tourism Enhancement Fund (TEF) in securing the services of a private law firm;
- (2) Letter, dated 2009 June 18, from Mrs. Jennifer Griffith to the OCG, in response to the OCG's letter of 2009 June 10;
- (3) Letter, dated 2009 June 30, from the OCG to Mrs. Jennifer Griffith requesting further information on the retention of the referenced legal services;

- (4) Letter, dated 2009 July 16, from Mrs. Jennifer Griffith to the OCG in response to the OCG's letter of 2009 June 30;
- (5) Letter, dated 2009 November 3, from the OCG to Mrs. Jennifer Griffith advising her of the OCG's intention to now formally include the retention of the legal services rendered by DunnCox as a component of its ongoing Investigation into the American Airlines Guarantee Deal;
- (6) Letter, dated 2009 November 6, from Mrs. Jennifer Griffith, written in response to the OCG's letter of 2009 November 3.

*In 2009 June, the OCG, upon realizing that legal services were purportedly 'procured' on behalf of certain representatives of JAMVAC and the Tourism Enhancement Fund (TEF), questioned inter alia, (1) the appropriateness of same; (2) the approvals which were involved in the retention of such legal services; and (3) the associated costs of the services which were to be provided by DunnCox. You will no doubt now accept, particularly in light of the expressed terms of the GLC's letter to the OCG of 2009 November 12, that these are matters which the OCG is lawfully entitled to pursue and that, consequently, the pursuit of same cannot be regarded to be an "abuse of power" as you have asserted.*

*In its correspondence of 2009 June 10 and 2009 June 30, the OCG placed upon the record its consternation regarding the retention of the legal services and "the propriety of Government accountable/accounting officers/officials and other public servants, who are requisitioned in the said capacities, to seek such legal recourse at the expense of the Jamaican Taxpayers."*

*Without prejudice to the aforementioned, and in exercising fairness to public officials/officers, the OCG also articulated that it is mindful that "... every individual has a right to obtain legal representation in any matter, if so desired..." However, the fundamental issue that was of concern to the OCG then, and even more so today, as was aptly captured in our missive of 2009 June 10, is:*

*"... not one of the public servant's right to obtaining legal representation, but rather the propriety of doing so in a matter which requires the simple disclosure of information regarding the discharge of their daily functions and responsibilities in their capacities as*



*public servants, for matters which are related to the public body/bodies for which they are accountable.*

*The actions which have been taken by representatives of JAMVAC and TEF, and which are explicitly conveyed by the correspondence from DunnCox, begs the question as to whether or not public officials, who are accountable, both in law and administratively, for public bodies and/or agencies, can properly retain such services in the pursuit of responding to questions which are within the remit of their lawful public offices and responsibilities.”*

*Further, in its letter of 2009 November 3, to the Permanent Secretary, the OCG stated, inter alia, that “In the conduct of its Investigations, the OCG has received from Messrs. John Lynch and Lionel Reid, responses to its statutory requisition, through the offices of DunnCox. However, in more than one instance, the representations which have been made to the OCG, through DunnCox, has begged the question of the need for an Attorney-at-Law and whether the expense which has been placed upon the Taxpayers of Jamaica can in any way be justified”.*

*Therefore, it is factually incorrect to suggest, much less to expressly state and publish, that the OCG’s reasons for investigating the contract with DunnCox was in any way vindictive or motivated by ill-intent, ill-will, malice or retribution.*

*Further, you have also stated that it was only the OCG’s letter of 2009 November 10 which was copied to various divisions of Government with the intention of embarrassing DunnCox and/or to malign the firm’s good name and reputation. This very regrettable but manifestly false and unfounded assertion which imputes further malice and motive against DunnCox on the part of the Contractor General and the OCG, has been used, yet again, as the basis upon which you have boldly but erroneously accused the Contractor General and the OCG of an “abuse of power”.*

*For the record, we must respectfully advise you that all six (6) pieces of correspondence which are referred to above, were copied to various authorities of the Government. In fact, from as early as 2009 June 10, all six (6) pieces of correspondence were copied, at all material times, to all of the State authorities and persons that are listed in the OCG’s letter of 2009 November 10,*

*save and except for the Hon. Bruce Golding, the Prime Minister of Jamaica. The letters which are listed at items #5 and #6 were copied to the Prime Minister.*

*It is also important to note that, included in the list of the Government authorities and persons who were copied on the OCG's correspondence of 2009 June 10, and all subsequent correspondence as are listed above, were your two (2) Clients, Public Officers Mr. John Lynch and Mr. Lionel Reid.*

*The documented fact circumstances, therefore, do not in any way, shape or form, support your arguments of vindictiveness, malice or retribution on the part of the Contractor General or the OCG, nor do they support your contention of an abuse of power by the Contractor General.*

*In the circumstances, and having regard to the grave and injurious nature of the unfortunate comments which have been made by you against the Contractor General and his office, and the manner in which you have falsely asserted that he has discharged his statutory functions – none of which is in any way supported by the facts, we must respectfully advise that the OCG requires both an apology and a withdrawal of the referenced allegations and that same be done in writing no later than **2009 December 21**. Your letter should be copied to all persons and authorities to whom your letter of 2009 December 10 was copied.*

*In closing, and having regard to the exceedingly reckless and injurious statements which you have made, it is very apt to concur with you that “while zeal and exuberance in the execution of one's duty may be important qualities, they cannot under any circumstances be an excuse for an attempt to trample and destroy legal rights and our reputation.”*

*Yours sincerely,*

*Maurice Barrett (Signed)*

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*Maurice Barrett*

*Chief Investigator*

*for and on behalf of the Contractor General<sup>106</sup>*

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<sup>106</sup> OCG letter to DunnCox which was dated 2009 December 14 (See Appendix II)

Despite having laid out the facts of the OCG's interest in and its reasons for launching its Investigation, as well as the falsities which were contained in DunnCox's letter of 2009 December 10, DunnCox, in responding to the OCG's letter of 2009 December 14, again accused the OCG of making an unjustified threat in its letter of 2009 November 19.

The OCG's letter of 2009 November 19 had acknowledged the receipt of DunnCox's couched compliance with the OCG's statutory requisition and served to reiterate the OCG's positions which were conveyed in its 2009 November 16 correspondence.

According to DunnCox, the OCG in reiterating the content of its letter of 2009 November 16, and advising that, should DunnCox become the subject of the OCG's scrutiny in the future, the positions which were contained therein would be fully enforced against DunnCox without condition, was tantamount to a threat and one in respect of which DunnCox had not sought an apology from the OCG.

However, the OCG did not share DunnCox's opinion and responded to the law firm as follows:

VERY URGENT

*2009 December 21*

*DunnCox*

*Attorneys-At-Law*

*P.O. Box 365*

*48 Duke Street, Kingston*

*Jamaica, W.I.*

*Attention: Mr. Lincoln Eatmon, Esq., Senior Partner*

*Dear Sirs:*

Re: Request for Apology and Withdrawal of Defamatory Statements Made Against the Contractor General and the Office of the Contractor General – In the Matter of the Retention of Legal Services by Jamaica Vacations Limited (JAMVAC) to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act

We are in receipt of your letter of even date.

Once again, and quite regrettably, you have chosen to skirt the facts. This is conduct which, we must forcefully assert, is reprehensible and that which would not be expected from a Law Firm of the standing and good reputation of DunnCox. We will respond to the numbered paragraphs of your letter as follows:

Response to Your Paragraph #1

The statement of the Office of the Contractor General (OCG) which you placed in italics, and which you have characterized as “a threat”, is not a threat. It is a statement of the OCG's mandate under the law. We make no apology for it and, in point of fact, take this opportunity to re-iterate same without any equivocation or condition.

Response to Your Paragraph #2

You have disingenuously ignored the fact that the point in issue is not when the OCG's Investigation was commenced but the reasons and motives which you have attributed to the OCG for same. The reasons and motives which you have placed upon the record have all imputed bad faith, vindictiveness and retribution on the part of the OCG. By ignoring your conduct in this regard, you have played fast and loose with the facts.

Regarding the issue of the persons to whom the OCG's correspondence was copied, you have ignored the fact that the OCG letters which were confined to the American Airlines Investigation were not copied to third parties whereas all of the OCG's letters which had to do with the Retention of Legal Services by JAMVAC, commencing with the OCG's letter of June 10, 2009 to the Permanent Secretary in the Ministry of Tourism, were the ones which were copied to the named third parties.

*The accusations which you have leveled against the OCG have, however, expressly stated that the OCG only began copying letters to the named third parties commencing with its letter to you of November 10, 2009. You have been provided with documentary evidence that your assertion in this regard is factually inaccurate and that the reason why the OCG copied all the named Government officials on its JAMVAC Retention of Legal Services related correspondence was because the OCG had deemed it imperative, from the very outset in June 2009, to bring the matter to the formal attention of the relevant State authorities.*

*Regrettably, you have, however, chosen to set these explanations aside in what appears to be your quest to sacrifice the truth on the altar of expediency and to avoid making an apology to the OCG for your unfortunate conduct.*

*Response to Your Paragraphs #3, #4 and #5*

*The OCG is not averse to being constructively criticized. What we will strongly object to is when false information is used to recklessly attack the reputation of the OCG organization and that of the Contractor General. You have unequivocally stated that the OCG's Investigation of the Government contract which was entered into with you by JAMVAC was actuated by "retribution". That, Sirs, is not a criticism. It is a manifestly false statement of fact which has unequivocally imputed malice, bad faith and an abuse of office and power on the part of an Independent Commission of Parliament which, under the law, exercises quasi-judicial powers."*

**Analysis of Expenditure associated with the Retention of Legal Services**

The information which was provided by Mrs. Jennifer Griffith and DunnCox, has revealed that for the period of 2009 June 8 to 2009 July 16, a total sum of J\$294,144.20 was incurred by JAMVAC, in regard to the legal services which were rendered by DunnCox, to provide responses to the OCG's Requisitions on behalf of Mr. Lionel Reid and Mr. John Lynch. The referenced fees were paid by JAMVAC on 2009 August 14.

It should be noted that, according to DunnCox, the total fees which were incurred between the period of 2009 July 17 and 2009 November 6, amounted to J\$147,780.00.

Therefore, cumulatively, the total fees which have been incurred by JAMVAC, through Mr. John Lynch and Mr. Lionel Reid, to provide responses to questions which pertain to the discharge of their respective public duties, amounted to J\$441,924.20, as at 2009 November 6.

Therefore, as at, 2009 November 6, JAMVAC would have incurred expenses just short of one half of a million Jamaican dollars simply to allow for accountable officers to be questioned by the OCG and to be held accountable for their actions during the discharge of their duties.

It is, however, important to note that the OCG's Requisition of 2009 November 10 required DunnCox to indicate *"The total fees which remain outstanding and payable by JAMVAC, up to November 6, 2009, in respect of the matter which is under Investigation."*

In response to the referenced question, the OCG was advised by DunnCox, in its sworn statement of 2009 November 18, that *"At present no fees remain outstanding and/or payable."*

Therefore, taken to its logical conclusion, and given the fact that the fees which were incurred by JAMVAC exceed that which was paid, the OCG has been led to conclude that (1) either DunnCox has no intention of billing JAMVAC with the 'excess' fees or (2) the services which were rendered by DunnCox, for the period of 2009 July 17 to 2009 November 3, was, in fact, *pro bono*.

In either situation, the circumstances have raised a level of curiosity which would suggest more questions than there are answers.

## **MAJOR CONCLUSIONS**

Based upon the documents which have been reviewed, as well as the sworn written statements which have been received from the representatives of JAMVAC, TEF, the MOT and the JTB, the OCG has arrived at the following considered Findings and Conclusions:

1. The evidence which has been presented to the OCG has indicated that **JAMVAC initiated the deal with AA** and not the other way around as was falsely asserted by the Hon. Edmund Bartlett in his Cabinet Submission of 2008 September 9. The justification which has been given to the OCG, *inter alia*, includes:
  - d. Representations that AA was making preparations to reduce the number of flights to Jamaica and other destinations in the world;
  - e. AA is one of the largest carriers in the Caribbean and has connecting flights from several other regions in the world;
  - f. Other countries were also forming similar agreements with AA to secure flights to their territories. Therefore, it was deemed to be imperative that JAMVAC got on board in order to save the tourism industry from the possible effects of flight reductions.
  
2. The evidence which has been adduced by representatives of JAMVAC, the MOT and TEF, in regard to the other airlines which were allegedly approached regarding securing airline seats to Jamaica is, at best, sparse.

The only written indication which was provided that other airlines were approached was correspondence between Air Jamaica and JAMVAC which revealed that Air Jamaica was requesting that an agreement to secure airline seats for the six (6) worst months of the year be signed. This was the only communication submitted to the OCG by Mr. Lionel Reid and Mr. John Lynch as evidence that there was dialogue with Air Jamaica regarding a similar agreement.



Both Mr. Lynch and Mr. Reid indicated that they were unable to locate any other communication between JAMVAC and Air Jamaica.

3. Additionally, although it was stated by Mr. Reid and Mr. Lynch that there was dialogue between JAMVAC and US Airways and Delta, neither Mr. Lynch nor Mr. Reid was able to provide the OCG with any evidence to indicate that any formal dialogue took place with US Airways and Delta. In essence, the OCG has not been provided with physical evidence to indicate that other alternatives were weighed by JAMVAC before it was decided that JAMVAC would enter the Air Service Agreements with AA.
4. The OCG has found and concluded that the Air Service Agreements were submitted to the Attorney General's Department for comments prior to their being signed. The submission, which solicited the AG's comments and responses, was made by JAMVAC in 2008 July.
5. Based upon the sworn statements which have been provided to the OCG, the OCG has concluded that the Air Service Agreements between JAMVAC and AA were signed by Mr. John Lynch prior to 2008 August 11.
6. With regard to the Cabinet Submission and Decision regarding the Airlift Guarantee Deal, the OCG found and has concluded that the Cabinet did not come to a decision regarding these Agreements.

In its Requisition to the Cabinet Office, the OCG requested all Cabinet Decisions and Submissions regarding these Agreements. As at 2009 November 3, the only Cabinet Decision regarding these Agreements was a provisional Cabinet Decision. **The referenced Cabinet Decision indicated that this "matter should be withdrawn from the Agenda until further consultation on the**

*recommendations and alternative proposals, including consultations with the Attorney General's Department.*” (OCG’s Emphasis).

It should also be noted that up to the date of the response from the Cabinet Office, i.e. 2009 November 3, and the date of the writing of this Report, the OCG has not been provided with any other Cabinet Decision which states that these Agreements were approved by the Cabinet.

7. Based upon the compendium of facts, including the date on which the Air Service Agreements were signed, the date on which the Cabinet Submission was made and the fact that the Cabinet made no conclusive decision regarding the Air Service Agreements, the OCG has been led to conclude the following:
  - a. The Air Service Agreements were improperly and irregularly awarded as the approval requirements which were held out by JAMVAC as being a necessary requirement for the consummation of the contract were never received;
  - b. The fact that the Air Service Agreements were signed prior to 2008 August 11, and, consequently, before the submission for approval was made to the Cabinet, meant that the approval process would have been retroactive and would amount to a “*rubber stamping*” of what was already a done deal;
  - c. The Cabinet of Jamaica was misled as the information which was contained in the Cabinet Submission of 2009 September 9 indicated that JAMVAC accepted an unsolicited proposal from AA. However, the sworn documentary evidence which has been provided to the OCG has contradicted this statement.
  
8. The OCG has concluded that there was to have been marketing strategies within the three gateways. However, the Findings have indicated that there were

marketing strategies in place for New York and Miami but not specifically for Chicago or Dallas. Of note, Chicago and Dallas are two of the gateways mentioned in the Air Service Agreements.

9. The OCG has concluded that JAMVAC took steps to ensure that the flights were being monitored and that AA was meeting its minimum seat requirements. In regard to the monitoring of flights, the evidence which has been provided to the OCG has revealed that there were monitoring strategies which were put in place to monitor the flights.

The information which has been provided to the OCG has revealed that Mr. Anthony King, Regional Director, Airline & Tour Operator (JTB), was assigned the task of monitoring these flights.

10. With regard to the adherence to the procurement guidelines, the documentary evidence which has been provided has led the OCG to conclude that JAMVAC sought and received advice and approval at varying levels for the Air Service Agreement.

As such, the OCG has concluded that JAMVAC relied upon the advice of both the Attorney General's Department and the Ministry of Finance and the Public Service which proffered that the Air Service Agreements did not fit within the parameters of the GOJ Procurement Procedures.

11. The OCG has found and concluded that TEF approved the funds for financing the US\$4.5 Million Guarantee Deal in its Board meeting of 2008 July 23.
12. The Findings of the Investigation have revealed and have subsequently led the OCG to conclude, based upon the sworn and written testimony of Mr. John Lynch and Mr. Lionel Reid, that, up to 2009 November 2, no money had been paid to

AA by JAMVAC, TEF and/or by the Government of Jamaica in regard to the US\$4.5 Million Airlift Guarantee Deal.

13. The OCG has concluded that the contract for the retention of the legal services of DunnCox was both improperly and irregularly awarded when measured against the requirements of Section 4 (1) of the Contractor General Act. This conclusion is premised upon the fact that neither the Permanent Secretary in the MOT nor the Board of JAMVAC had granted permission for the execution of the contract as at 2009 June 9. Further, a signed contract was not executed between DunnCox and JAMVAC until 2009 June 26.

Despite this fact, DunnCox had begun rendering services to JAMVAC from as early as 2009 June 9 and had billed the Public Body for same. The Board of JAMVAC eventually granted its approval for the contract with DunnCox and regularized same at its Board Meeting of 2009 June 25 – but only after the OCG had formally written, on 2009 June 10, to the Permanent Secretary in the MOT, to enquire into and to raise its strong concerns regarding the matter.

14. As at 2009 November 6, JAMVAC had incurred legal fees amounting to some \$441,924.20 for legal services which were rendered by DunnCox to assist Mr. John Lynch and Mr. Lionel Reid to provide responses to the OCG's enquiries.

It is the OCG's considered opinion and conclusion that these fees cannot be justified by JAMVAC nor should they have ever been permitted to be incurred at the expense of the Jamaican Taxpayers.

Consequently, the OCG has concluded and is indeed fortified in its views that the retention of the legal services of DunnCox by JAMVAC amounts to an abuse of positions, privilege and the Taxpayers' money by both Mr. John Lynch and Mr. Lionel Reid.

15. Based upon the representations which have been made to the OCG and the observations which were made during the course of its monitoring of the services which were provided by DunnCox, the OCG has concluded that there needs to be a clear and unambiguous policy which governs instances in which public officials/officers can engage the private bar, for what purposes and if so, whether same can be properly done at the expense of the Jamaican Taxpayers.
  
16. The OCG has also been led to conclude that the exemption of non-routine legal services from the standard procurement guidelines has opened the doors for an abuse of the process, challenges to the lawful authority of the OCG to enquire into such matters and an overall lack of appreciation for the distinct requirements of the law versus that of a policy. In essence, the OCG's experience in the instant case would, *prima facie*, suggest that both Public Bodies and contractors who are applying the exemption believe that they are a law unto themselves for which there can be no call to be held accountable, even by an Independent Commission of Parliament which is en clothed with the powers of a Judge of the Supreme Court and which is lawfully mandated to make such enquiries.
  
17. In light of the challenges which have been faced by the OCG during the conduct of its Investigation, it must be concluded that both Public Officials and private individuals, and contractors, as was evidenced by the conduct of the Office of the Cabinet and the law firm, DunnCox, in the instant matter, are not fully apprised and or appreciative of the Contractor General Act and, in particular, the reach and implications of Section 18 (4) of the Contractor General Act.

In light of the foregoing, and having regard to the Findings and Conclusion which are discussed in greater detail in this Report, the OCG has respectfully made the following considered Referrals and Recommendations.

## REFERRALS

The OCG, in the conduct of its Investigation, is required to be guided by Section 21 of the Contractor-General Act.

Section 21 of the Contractor-General Act provides as follows:

*“If a Contractor-General finds, during the course of his Investigations or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer or member of a public body, he shall refer the matter to the person or persons competent to take such disciplinary or other proceeding as may be appropriate against that officer or member and in all such cases shall lay a special report before Parliament.”*<sup>107</sup> (OCG Emphasis)

1. Pursuant to the mandatory statutory obligations which are imposed upon a Contractor General by Section 21 of the Contractor General Act, the OCG is hereby formally referring a copy of this Report to the Attorney General for her to determine and to advise what steps may be taken to censure and/or to hold to account the Hon. Edmund Bartlett, Mr. John Lynch and Mr. Lionel Reid with regard to the role which was played by each of them in the irregularities which have been unearthed by the OCG in this matter.

The referral is being made on the basis that there is *prima facie* evidence which is contained herein and, more particularly and importantly, in the sworn statements that were furnished to the OCG by the relevant Respondents, which would suggest that:

- a) The Hon. Edmund Bartlett misled the Cabinet of the Government of Jamaica in his 2008 September 9 Cabinet Submission by falsely representing, in writing, that “*JAMVAC has favourably considered a verbal, unsolicited*”

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<sup>107</sup> Contractor-General Act. 1983

*proposal from American Airlines*” when, in point of fact, the entire matter was one which was initiated with AA by none other than the Minister himself and Mr. John Lynch at a meeting which was convened in Miami “*on or about 2008 March 22*”. (OCG’s emphasis).

- b) Mr. John Lynch signed contracts with American Airlines prior to same being submitted to and/or approved by the Cabinet of the Government of Jamaica, despite the fact that Cabinet Approval was held out by him as a condition precedent for the award of the referenced contracts. To date, no proof of any Cabinet Approval, regarding the deal, has been shown to the OCG; and
- c) Mr. John Lynch and Mr. Lionel Reid engaged the services of the law firm of DunnCox prior to and without obtaining the requisite approvals of the Board of Directors of JAMVAC and/or the Permanent Secretary of the MOT.

The OCG is of the considered opinion that it is within the purview of the Attorney General to determine and to advise what appropriate and/or applicable actions may be taken or initiated against the Hon. Edmund Bartlett, Mr. John Lynch and Mr. Lionel Reid, having regard to all of the circumstances of the case.

In addition, the Hon. Prime Minister may choose to exercise his prerogative powers to discipline the Hon. Minister and the two other Public Officers. All three gentlemen have exhibited conduct of varying degrees which would suggest that they do not fully appreciate that they are Public Officers and that they must be held fully accountable to the Taxpayers of the country for their actions.

## **RECOMMENDATIONS**

Section 20 (1) of the Contractor-General Act mandates that *“after conducting an Investigation under this Act, a Contractor-General shall, in writing, inform the principal officer of the public body concerned and the Minister having responsibility therefore of the result of that Investigation and make such Recommendations as he considers necessary in respect of the matter which was investigated.”* (OCG’s Emphasis).

1. The OCG recommends that the JAMVAC, and all other Public Bodies and Public Officials, must, as a matter of good business procedure and practice, be compelled to reduce into writing any discussions which are undertaken regarding national commercial transactions which are being negotiated on behalf of the People, Taxpayers and Government of Jamaica. In the case of JAMVAC, and as it relates to the Guarantee Deal, this is of particular importance since in their response to the OCG’s Requisition, Mr. John Lynch and Mr. Lionel Reid indicated that there were discussions with US Airways and Delta regarding similar Airlift Agreements but there was no documentary evidence to indicate what those discussions were or if, indeed, there were any discussions in the first place as is being alleged.
2. The OCG recommends that in agreements of this magnitude, JAMVAC and/or any other Public Body should ensure that all possible options are explored before entering in these deals. There was no indication that there were serious discussions with other airlines regarding similar Airlift Agreements.
3. It is recommended that an immediate review of the evaluation and approval processes for commercial agreements, by the Ministry of Finance and the Public Service, be undertaken by the Public Administration and Appropriations Committee of the House of Representatives and by the Auditor General.





In light of the above, and until such anomalies are rectified by the Ministry of Finance and the Public Service and the Cabinet of Jamaica, the OCG hereby recommends and reminds Public Bodies that, irrespective of the exclusions and exemptions which are granted in the procurement guidelines, **all** Public Body commercial transactions, with the exception of land acquisition contracts, remain within the scrutiny and jurisdiction of the Contractor General.

As such, it is further recommended that due care be exercised to ensure that there is merit, transparency and impartiality in the consummation of any and all Government contracts.

### **Special Recommendations**

1. In light of the challenges which have been identified by the OCG during the course of this Investigation, it has been both prudent and necessary to make a recommendation regarding the current procurement guidelines and the exemptions which the present Administration has granted in respect of the retention of legal services.

Public Bodies and Attorneys-at-Law, are aware that certain non-routine legal services have been exempt from the ambit of the standard Government of Jamaica procurement procedures. However, what remains a seeming anomaly which requires fulsome attention, are the instances and circumstances under which a Public Official/Officer can rightly and justifiably resort to legal representation at the expense of the Jamaica Taxpayers.

As such, the OCG is respectfully bringing the matter to the attention of the Houses of Parliament and the Cabinet of Jamaica with a recommendation that such necessary rules and/or procedures be drafted to prevent a recurrence of what has transpired in the OCG's Investigation.

The matter at hand is one which, if left unaddressed, has the potential to erode the foundations of accountability and transparency within the Jamaican Public Sector and, to do so at the expense of the Jamaican Taxpayers.

2. In light of the gravity of the challenges which have been mounted against the OCG by DunnCox, as well as the nature of the false, injurious and damaging allegations which were made by DunnCox against the OCG regarding the OCG's motives for investigating the contract between DunnCox and JAMVAC, the OCG hereby posits what it considers to be a fundamental and necessary recommendation to insulate and protect the OCG against unfounded and factually incorrect assertions.

The OCG respectfully recommends that the Parliament and Government of Jamaica take the necessary and reasonable steps to ensure that Government contractors and Public Bodies are unambiguously and forthrightly advised that exemptions from the procurement guidelines do not equate to an exemption or exclusion from the jurisdiction of the scrutiny of the OCG.

Further, the OCG respectfully recommends that the Parliament of Jamaica should, in the public interest, review the Contractor General Act and, in particular, Section 18 thereof, to ensure that Section 18 (5) of the Act cannot be utilized to restrict the provision, to a Contractor General, of any information regarding Government of Jamaica contract awards, on the basis that to do so would violate the Attorney/Client privilege, or any other secrecy or confidentiality prohibition which is otherwise recognized by law.

**OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA**

**Special Report of Investigation**

**Conducted into the Air-lift Guarantee Agreements which were entered into between  
American Airlines (AA) and Jamaica Vacations Limited (JAMVAC) and  
Supplemental Report of Investigation into the Retention of the Legal Services of the  
Law Firm DunnCox by JAMVAC**

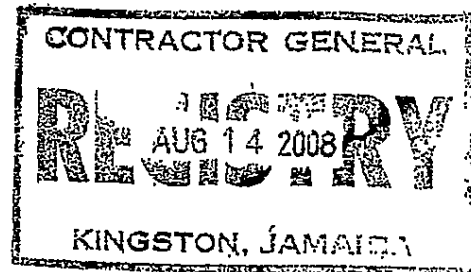
**Ministry of Tourism**

**Appendices**

# APPENDIX I

August 12, 2008

Mr. Greg Christie  
The Contractor General  
The Contractor General Office  
Of the National Contracts Commission  
16 Oxford Road  
Kingston 5



Dear Mr. Christie,

**Re: Guarantee of US\$4.5 million to American Airlines by the  
Tourism Enhancement Fund (T.E.F.)**

The Office of the Contractor General (O.C.G.) is being request to immediately investigate and report publicly for the benefit of the people of Jamaica the issuing of a guarantee to American Airlines in the amount of US\$4.5 million by the way of funds from the Tourism Enhancement Funds (T.E.F.). This is in fact a procurement of services from American Airlines and therefore would be subject to the established procurement guidelines.

You may recall an announcement by the Minister of Tourism, the Honourable Edmund Bartlett in relation to contracting for some 2000 additional seats per week to facilitate tourism arrivals into Jamaica. This arrangement was based on American Airlines providing these additional seats from Miami, Dallas and Chicago to Montego Bay.

The Minister shared this information with the members of the J.H.T.A. at their Annual General Meeting in Montego Bay on July 10, 2008, and subsequently convened a meeting with the major Hotel Operators to request financial support. No Hotel considered the proposal sufficiently worthy of financial support.

The next stop was to the Jamaica Tourist Board (J.T.B.), where funding was not available. Thereafter, the Minister requested payment through the Ministry of Finance and the Public Service.

*Copy MB & C  
Per discussion*

*J  
Aug. 14*

Page 2

It is understood that Minister Wehby in a letter to Minister Bartlett rejected the request on several grounds including the fact that payment to American Airlines to compete against our own National Airline, Air Jamaica on the Miami and Chicago routes would be inimical to our interest and inappropriate use of resources. But this didn't dissuade Minister Bartlett and his team. Having been turned down by the Ministry of Finance and the Public Service, the matter was brought to the Tourism Enhancement Fund (T.E.F.).

Rather than calling a Board Meeting the approach taken was to round-robin members by telephone advising them that:

1. the request had been approved by the Prime Minister.
2. it is urgent that they sign and return immediately

This approach was apparently taken in anticipation that one or two Board Members may have asked searching questions or challenges to the request as being completely outside of the mandate of the Tourism Enhancement Fund (T.E.F.).

I would refer you to the legislation governing the Tourism Enhancement Fund (T.E.F.), and request that you acquaint yourself with the rationale for the setting up of the Fund.

On a related matter, you may want to enquire as to the hiring of Mr. Lionel Reid as Executive Director of JAMVAC? Was this position advertised? How much is he paid? Is he paid in US\$ or JA\$? What other benefits does he enjoy?



Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ Building  
16 Oxford Road  
P.O. BOX 540  
KINGSTON 5  
JAMAICA, W.I.

No. :  
TELEPHONE No.:876-929-8560/6466  
FAX No. : 876-929-2476  
E-mail: hchisholm@ocg.gov.jm

October 23, 2009

Ambassador Douglas Saunders, C.D.  
Cabinet Secretary  
Office of the Cabinet  
1 Devon Road  
Kingston 10

COPY

Dear Ambassador Saunders:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million**

The Office of the Contractor General (OCG), acting on behalf of the Contractor General, has formally initiated an enquiry regarding an air-lift guarantee agreement which was reportedly entered into between American Airlines and the Government of Jamaica with financing being provided from the Tourism Enhancement Fund (TEF).

The decision to commence the Enquiry was taken by the OCG on September 5, 2008 following, *inter alia*, the publication of a media article in the Daily Gleaner of 2008 September 4 and the receipt of a letter from a concerned citizen. The subject Gleaner article quoted Mr. Godfrey Dyer, the Chairman of the Tourism Enhancement Fund as saying, *"It is a very good investment. This is something that we support, and when it came before my board, we examined it and we believed it would be money well spent."*

As we will require your assistance and full cooperation to successfully prosecute this investigation, it is very important that your attention is formally directed to the following provisions of the Contractor General Act:

- (1) Sections 4 (1) (a) (i) and (ii) which mandates the Contractor General, "... on behalf of Parliament- to monitor the award and the implementation of Government contracts with a view to ensuring that such contracts are awarded impartially and on merit (and that) the circumstances in which each contract is awarded ... do not involve impropriety or irregularity ...".
- (2) Section 4 (1) (b) which mandates the Contractor General, "... on behalf of Parliament- to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof".





- (3) Section 15 (1) which prescribes the discretionary power of a Contractor General to conduct an investigation into any or all of the following matters:
  - (a) "the registration of contractors";
  - (b) "tender procedures relating to contracts awarded by public bodies";
  - (c) "the award of any Government contract";
  - (d) "the implementation of the terms of any Government contract";
  - (e) "the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence";
  - (f) "the practice and procedures relating to the grant, issue, suspension or revocation of prescribed licences".
- (4) Section 4 (2) (b) which prescribes the power of a Contractor General "to have access to all books, records, documents, stores or other property belonging to Government, whether in the possession of any officer of a Public Body or a contractor or any other person".
- (5) Section 4 (2) (d) which prescribes the power of a Contractor General "to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession of any public officer or any other person".
- (6) Section 4 (2) (e) which prescribes the power of a Contractor General "to have access to any premises or location where he has reason to believe that any such books, records, documents or other property as are referred to in paragraph (d) or any property which is the subject of a prescribed licence, may be found".
- (7) Section 4 (3) of the Act which prescribes the power of a Contractor General to "require any Public Body to furnish in such manner and at such times as may be specified by the Contractor General, information with regard to the award of any contract and such other information in relation thereto as the Contractor General may consider desirable".
- (8) Section 4 (4) which prescribes that, "For the purposes of paragraphs (d) and (e) of subsection (2) the Contractor-General shall have power to require any public officer or any other person to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the grant, issue, suspension or revocation of any prescribed licence and such other information in relation thereto as the Contractor-General considers desirable".
- (9) Section 5 (1) which provides that, "In the exercise of the powers conferred upon him by this Act, a Contractor-General shall not be subject to the direction or control of any other person or authority".
- (10) Section 17 (1) which prescribes the power of a Contractor General "to adopt whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of (the) Act, to obtain information from such person and in such manner and make such enquiries as he thinks fit".



- (11) Section 17 (2) which provides that "Nothing in this Act shall be construed as requiring a Contractor General to hold any hearing and, no person shall be entitled as of right to comment on any allegations or to be heard by a Contractor General".
- (12) Section 18 (1) which prescribes the power of a Contractor General, "at any time, (to) require any officer or member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in his possession or under the control of that officer, member or other person".
- (13) Section 18 (2) which prescribes the power of a Contractor General "to summon before him and examine on oath any person who has made representations to him or any officer, member or employee of a public body or any other person who, in the opinion of the Contractor General, is able to furnish information relating to the investigation – and such examination shall be deemed to be a judicial proceeding within the meaning of Section 4 of the Perjury Act".
- (14) Section 18 (3) which provides that "For the purposes of an investigation under this Act, a Contractor General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents".
- (15) Section 18 (4) which provides that "Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person under the Official Secrets Act, 1911 to 1939 of the UK (or of any Act of Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor General for the purpose of an investigation ...".
- (16) Section 18 (5) which provides that "No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law."
- (17) Section 22 which provides that, "The proceedings of a Contractor-General shall not be rendered void for want of form".
- (18) Section 29 which provides as follows:
  - "Every person who –
  - (a) willfully makes a false statement to mislead or attempts to mislead a Contractor General or any other person in the execution of his functions under this Act, or
  - (b) without lawful justification or excuse –
    - (i) obstructs, hinders or resists a Contractor General or any other person in the execution of his functions under this Act; or

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- (ii) fails to comply with any lawful requirement of a Contractor General or any other person under this Act, ....

shall be guilty of an offence ...”.

It is also instructive that you should note that there are Public Officers who are misguided in the belief that the aforementioned powers of the Contractor General, to monitor or to investigate the “award” of contracts etc., do not arise until the subject contract or licence/permit is actually awarded or issued, as the case may be. We are obliged to advise you that any such belief is unfounded and has no validity in law. In the case of *Lawrence v. Ministry of Construction (Works) and the A.G. (1991) 28 J.L.R. 265*, the Supreme Court of Jamaica was moved by way of originating summons, at the instance of the Contractor General, to rule on this very point. Mr. Justice Courtney Orr, in that case, held unequivocally as follows:

*“The proper interpretation of the (Contractor General) Act is one which empowers the Contractor General to monitor the pre-contract stages of government contracts and to obtain information from public bodies prior to the award of such contracts (my emphasis)... The ordinary meaning of the words of the statute in light of the context and grammar suggest no other interpretation”.*

In the discharge of the mandates of the Contractor General under the Contractor General Act and in furtherance of the expressed powers which are reserved to him by the Act, the OCG, acting on behalf of the Contractor General, now hereby formally requires you to fully comply with the below-mentioned requisitions by providing all of the information and documentation which is demanded of you and to supply same in a sealed envelope, marked ‘Confidential’ and addressed to the Contractor General. **The envelope must be deposited at the reception desk of the Offices of the Contractor General, PIOJ Building, 16 Oxford Road, Kingston 5, no later than 3:00 PM in the afternoon on Thursday, October, 29, 2009.**

In responding to the below-mentioned requisitions or questions, you are respectfully asked to be guided by the following:

- (a) You must provide written responses to all of the requisitions or questions.
- (b) Your responses must be declared and certified by you before a Justice of the Peace to be complete, accurate and truthful. Your declaration must be in the form which is enclosed herewith.
- (c) All written responses which are provided by you must be provided in a single document and must be numbered in the same chronological sequence as the questions or requisitions to which they relate. For example, your response to Requisition/Question #1 must be numbered ‘1’, your answer to Requisition/Question #2 must be numbered ‘2’, and so forth.
- (d) **An electronic copy of your written response must accompany the certified hardcopy. The electronic copy must be provided in a Microsoft word format on a single compact disk.**
- (e) Any document which is supplied by you in support of a response must be properly labeled, numbered and marked to identify what it is and the requisition or question to which it relates.



(f) Should you mislead, resist, obstruct or hinder a Contractor General in the execution of his functions or fail to provide a complete, accurate and truthful response to any of the requisitions or questions which are set out below, you will become liable, *inter alia*, to criminal prosecution under Section 29 of the Contractor General Act.

**REQUISITIONS/QUESTIONS**

1. A copy of an extract from the Minutes of Jamaica Vacation's (JAMVAC) Board Meeting which was held on June 18, 2008, regarding the Air-lift Guarantee Agreement between JAMVAC and American Airlines indicated that: *"Tabled at the meeting was letter from the Chairman dated 2008 June 12 to Mr. Peter Dolara, American airlines, indicating that the proposed agreement was subjected to governmental approval, which he was confident would be obtained at the Cabinet sitting on Monday June, 2008 following which he would be in a position to give a commitment on June 17, 2008."*

Please provide a copy of all Cabinet Submissions and Decisions regarding the Air-lift Guarantee Agreements which were consummated between JAMVAC and American Airlines.

2. Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same.

Yours respectfully,

Hisani Chisholm (Ms)  
Special Investigator  
for and on behalf of the Contractor General

Enclosure -Form of Declaration





**CABINET OFFICES**

1 DEVON ROAD,  
P.O. BOX 272  
KINGSTON 6, JAMAICA

No. CS.10/09-15

27<sup>th</sup> October, 2009

CONFIDENTIAL

Mr. Greg Christie  
Contractor-General  
Office of the Contractor-General  
16 Oxford Road  
Kingston 5

*nB/ke/gc*  
*28.10.09*  
*2.15 PM*

Dear Mr. Christie,

We are in receipt of your letter dated 23<sup>rd</sup> October, 2009, concerning your enquiry into the "alleged American Airlines Air-Lift Guarantee Deal", and the related Notice of Formal Requisition for Information and Documentation thereon. The Cabinet Office is aware that such a notice had also been issued to the Permanent Secretary in the Ministry of Tourism.

We are advised that the Permanent Secretary has already informed you of the procedure which requires prior approval of the Cabinet for release of Cabinet Submissions. The relevant process is in train in that regard.

In the circumstances, it is requested that the proposed deadline for responses to the instant requisitions/questions be extended to Thursday, 12<sup>th</sup> November, 2009.

Yours sincerely,

Ryan Evans  
Senior Policy and Project Officer  
for  
Cabinet Secretary

Copies: Hon. Bruce Golding  
Prime Minister

OFFICE  
SECRETARY  
MINISTRY OF TOURISM

Mrs. Jennifer Griffith  
Permanent Secretary  
Ministry of Tourism

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CONFIDENTIAL



Ref. No.CS.11/09-2

CABINET OFFICE  
1 DEVON ROAD  
P.O. BOX 272  
KINGSTON 6  
JAMAICA  
TEL: 929-8880-5

CONFIDENTIAL

3<sup>rd</sup> November, 2009

Mr. Greg Christie  
Contractor-General  
Office of the Contractor-General  
PIOJ Building  
16 Oxford Road  
Kingston 5

OFFICE OF THE CONTRACTOR-GENERAL  
1st FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. BOX 545  
KINGSTON 5, JAMAICA, W.I.

Dear Mr. Christie,

Further to correspondence ending with your letter dated 28<sup>th</sup> October, 2009, concerning the enquiry by your Office into "Alleged American Airlines Air-Lift Guarantee Deal", enclosed herewith are the responses and documentation in relation to your requisition thereof.

I feel obliged, in closing, to confess my surprise and dismay that my attempt to indicate, by way of my letter of 27<sup>th</sup> October, 2009, that the matter was being expedited appears to have been subject to some degree of misinterpretation.

Yours sincerely,

Douglas Saunders  
Cabinet Secretary

MS/HC/GC

J  
4/4/09  
f.2009.

DS:em

Copies: Hon. Bruce Golding, Prime Minister

Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism

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Responses – Requisitions/Questions

1. Attached are a copy each of Cabinet Submission No. 519/MT 12/08 and the related Cabinet Decision No. 31/08 of 15<sup>th</sup> September, 2009.
2. No.

OFFICE OF THE COMPTROLLER-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

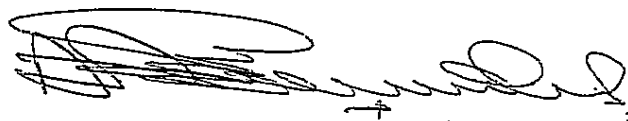
**The Voluntary Declaration Act: Section 7: Declaration to be in form in Schedule:**

I, Douglas Saunders, do solemnly and sincerely declare as follows:

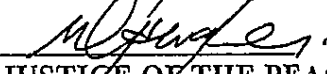
1. That I am sixty (60) years of age and I reside and have my true place of abode at 1 Melwood Avenue, Kingston 8, in the parish of St. Andrew.
2. That I have answered the questions posed and fulfilled the requisitions made to me in a letter from the Contractor-General dated October 23, 2009, completely, accurately and truthfully.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Voluntary Declarations Act.

TAKEN and ACKNOWLEDGED )  
 by the said Douglas Saunders at 1 Devon )  
 Road, Kingston 10, in the parish of St. )  
 Andrew on this 3<sup>rd</sup> day of November, 2009 )  
 in the presence of:



Douglas Saunders

WESLEY HUGHES  
  
 JUSTICE OF THE PEACE  
 For the parish of: KINGSTON  
 B00685

OFFICE OF THE CONTRACTOR-GENERAL  
 1<sup>ST</sup> FLOOR, PIOJ BUILDING  
 16 OXFORD ROAD  
 P.O. BOX 540  
 KINGSTON 5, JAMAICA, W.I.

# APPENDIX II

DOLN A. C. EATMON  
JOHN G. LEIBA  
JANICE A. CAUSWELL  
W. JOHN VASSELL, Q.C., LL.B.  
ENID F. CHIN, B.Sc (ECON)  
JEROME I. LEE, B.Sc (GOVT.), LL.B.  
JANET E. MORRISON, LL.B., LL.M.  
MARGARET A. MOODIE-JERVIS, LL.B.  
PAULINE A. FINDLAY, LL.B.  
HELEN E. EVELYN, LL.B.  
JOANNE E. WOOD, LL.B.  
DONOVAN C. WALKER, LL.B., LL.M. (LON)  
JULIANNE E. MAIS-COX, B.A., LL.B.  
COURTNEY A. BAILEY, LL.B.  
KIRK B. ANDERSON, LL.B.  
JERMAINE C. SPENCE, LL.B.  
HYACINTH F. LIGHTBOURNE, BBA, J.D. (MIAMI)

GEORGETTE T. WILTSHIRE, B.A., LL.B.  
PETER W. SIMMONDS, B.Sc., LL.B.  
FRANCINE E. HOWELL-BRYCE, BBA, LL.B. (LIVERPOOL)  
CANDICE T. STEWART, LL.B.  
ROXANNE A. MILLER, LL.B. (LMU)  
TERI-ANN A. LAWSON, B.A. LL.B.  
MICHELLE J. PARKER, B.Sc., LL.B., MBA  
COLEEN T. WEISE, LL.B.  
COURTNEY M. WILLIAMS, B.A., LL.B.  
TOPAZ L. M. JOHNSON, B.Sc., LL.B. (LON), M.Sc.  
MARIA L. BURKE, B.A., LL.B., M.Sc.  
SHAUNNA-KAYE CARTER, LL.B.

CONSULTANTS  
C. D. R. BOVELL, C.D., M.A., LL.M. (CANTAB)  
DENNIS G. EDMUNDS, B.A. (CANTAB)  
O. A. CAROL AINA, B.A. (SUSSEX)

P.O BOX 265  
48 DUKE STREET  
KINGSTON  
JAMAICA, W.I.

TELEPHONE: (876) 922 - 1500  
VoIP (U.S.A.): (678) 202 - 9818  
TELEFAX: (876) 922 - 9002  
(876) 924 - 9106

E-MAIL: info@dunncox.com  
WEBSITE: www.dunncox.com

OUR REF. YOUR REF.  
WRITER'S EXTENSION NUMBER

October 28, 2009

Chief Investigator  
Office of the Contractor—General  
PIOJ Building  
16 Oxford Road  
P.O. Box 540  
Kingston 5

Attention: Ms. Hisani Chisholm

Dear Sirs:

**Re: Notice of Formal Requisition for Information and Documentation to be  
Supplied under the Contractor General Act – Enquiry Into American Air-  
Lines Guarantee Deal for US\$4.5 Million**

Reference is made to yours dated October 23, 2009 to Mr. John Lynch, Chairman of Jamaica Vacations Limited, and Mr. Lionel Reid, Executive Director of Jamaica Vacations Limited.

Mr. Lynch is currently off the island on business and Mr. Reid is currently out of town on business. Thus they will not be able to complete your requisition in the requisite period.

Accordingly, we are requesting a short extension to November 9, 2009 to furnish their responses.

Yours faithfully,  
DunnCox

PER:   
CINDY LIGHTBOURNE

*AC/NS/GC*  
*J*  
*28/10/09*



A member of

**TERRALEX**  
The Worldwide Network of Independent Law Firms



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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ Building  
16 Oxford Road  
P.O. Box 540  
KINGSTON 5  
JAMAICA, W.I.

No. :

TELEPHONE No.: 876-929-8560/6466  
FAX No. : 876-929-2476  
E-mail: Mbarrett@ocg.gov.jm

**URGENT AND IMMEDIATE**

October 28, 2009

Ms. Cindy Lightbourne  
Attorney-At-Law  
DunnCox  
Attorneys-At-Law  
48 Duke Street  
Kingston

COPY

Dear Ms. Lightbourne:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million**

We write to acknowledge receipt of your letter of even date which was written on behalf of your Clients, Mr. John Lynch and Mr. Lionel Reid, and which was conveyed to the Office of the Contractor General (OCG) via facsimile a short time ago.

You have, on behalf of your Clients, requested an extension, to November 9, 2009, of the deadline which was previously set for your Clients to formally respond to the formal Requisitions of the OCG.

In your letter, you have sought to justify your request on the basis of the following representation, viz. *"Mr. Lynch is currently off the island on business and Mr. Reid is currently out of town on business. Thus they will not be able to complete your requisition in the requisite period."*

Upon the receipt of your letter, the Contractor General instructed his Executive Secretary to contact the offices of both Mr. Lynch and Mr. Reid to ascertain the physical whereabouts of Mr. Lynch and Mr. Reid.

We have attached, herewith, for the record and for your perusal, a copy of an Internal OCG Email File Note which was prepared by the Contractor General's Executive Secretary.



It is evident from the contents of the referenced File Note that the written representations which have been made by you, in so far as they relate to Mr. Reid, are, at a minimum, highly questionable. They have raised several serious questions.

Having regard to the circumstances, the OCG is now compelled to formally bring to your attention the following provisions of the Contractor General Act:

1. Section 18 (3) of the Contractor-General Act provides that *"For the purposes of an Investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents"*.
2. Section 18 (2) of the Contractor-General Act provides that *"... a Contractor-General may summon before him and examine on oath -*
  - (a) *any person who has made representations to him; or*
  - (b) *any officer, member or employee of a public body or any other person who, in the opinion of the, Contractor-General is able to furnish information relating to the Investigation,*

*and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act."*

The material import of the foregoing, *inter alia*, is that, in the instant matter, the Contractor General is *"a Judge of the Supreme Court"*, and you are an Officer of the Court who has made, at a minimum, highly questionable representations to the Contractor General.

Additionally, it is also critical that your attention is directed to the fact that any person who willfully makes any false statement to mislead, or misleads, or attempts to mislead, a Contractor General in the execution of his functions, is guilty of a criminal offence.

Indeed, you and your Clients may wish to be directed by the verbatim provisions of Section 29 of the Contractor General Act as follows:

*"Every person who -*

- (a) *willfully makes any false statement to mislead or misleads or attempts to mislead a Contractor-General or any other person in the execution of his functions under this Act; or*
- (b) *without lawful justification or excuse -*
  - i. *obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or*



- ii. *fails to comply with any lawful requirement of a Contractor General or any other person under this Act;*  
*or*
- (c) *deals with documents, information or things mentioned in section 24 (1) in a manner inconsistent with his duty under that subsection,*

*shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment."*

In the premises, we are now formally requiring that your Clients fully comply with the subject Requisition on or before the following specified dates and times:

1. Mr. Lionel Reid – no later than 12:00 Noon, on Friday, October 30, 2009
2. Mr. John Lynch – no later than 12:00 Noon, on Monday, November 2, 2009

Should any or both of your Clients fail to fully comply with the referenced demand, the OCG will promptly initiate all coercive and punitive measures which are available to it, under the law, to compel their compliance.

This will be the OCG's final demand to you and your Clients regarding this matter.

We sincerely trust that you and your Clients will be guided accordingly.

Very respectfully yours,

Maurice Barrett  
Chief Investigator  
for and on behalf of the Contractor General

Cc. Mr. John Lynch, Chairman of the Board, Jamaica Vacations Limited  
Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited

Enclosure

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**Greg Christie**

**From:** Kadian Jones [kjones@ocg.gov.jm]  
**Sent:** Wednesday, October 28, 2009 10:57 AM  
**To:** Greg Christie; Maurice Barrett; Hisani Chisholm  
**Cc:** 'Latoya Harris'  
**Subject:** File Note - Jamaica Vacations Limited

I was instructed by Mr. Christie to call and confirm if Mr. Lionel Reid, Executive Director of Jamaica Vacations Limited and Mr. John Lynch, Chairman of Jamaica Vacations Limited, were in office.

I called the Knutsford Boulevard branch of Jamaica Vacations Limited and spoke to Ms. Geraldine Wright in Mr. Lionel Reid's office at approximately 10:10am to find out if he was in office. She informed me that he was in office yesterday (October 27<sup>th</sup>), and that he should be coming back tomorrow (October 29<sup>th</sup>). Ms. Wright also informed me that Mr. Reid usually comes to the Kingston office whenever he is required to. However, she said that his official office is located in Montego Bay.

I called the Montego Bay office of Mr. Reid at approximately 10:19am to find out if he was there. When I was transferred to his office, Mr. Lionel Reid was the person who answered the telephone. When he identified himself to me, I told him I was just trying to ascertain whether or not he was in office.

Mr. John Lynch's office was also contacted at approximately 10:12am; I spoke to Ms. Ann-Marie Buckner. I told her I was trying to confirm if Mr. Lynch was in office, she informed me that he is off the island and is expected to return tomorrow, October 29<sup>th</sup>.

**Kadian Jones**  
**Executive Secretary to the Contractor-General**

**Confidential, Privileged, Proprietary and/or Sensitive Information**

This e-mail message and any document which is attached to it are intended solely for the use of the person or persons to whom the message is addressed. The message and/or its attachments may contain information which is confidential, privileged, proprietary and/or sensitive in nature. If you have received this e-mail message in error, you are hereby advised that any further dissemination, distribution, publication and/or copying of same is prohibited. If you believe that you have received this e-mail in error, please contact the sender by telephone and delete the message and its attachments from your system immediately. Please also note that we cannot guarantee that this message and its attachments, if any, are virus free or have been intercepted or amended.

**THANK YOU FOR YOUR CO-OPERATION.**

Office of the Contractor-General  
PIOJ Building  
16 Oxford Road  
P.O. Box 540, Kingston 5.  
JAMAICA W.I.  
Telephone #: 876-929-6460, 876-929-6466,  
876-929-7535, 876-929-7536  
Fax #: 876-929-7335

28/10/2009



LINCOLN A. C. EATMON  
JOHN G. LEIBA  
JANICE A. CAUSWELL  
W. JOHN VASSELL, Q.C., LL.B.  
ENID F. CHIN, B.Sc. (ECON)  
JEROME I. LEE, B.Sc. (GOVT.), LL.B.  
JANET E. MORRISON, LL.B., LL.M.  
MARGARET A. MOODIE-JERVIS, LL.B.  
PAULINE A. FINDLAY, LL.B.  
HELEN E. EVELYN, LL.B.  
JOANNE E. WOOD, LL.B.  
DONOVAN C. WALKER, LL.B., LL.M. (LON)  
JULIANNE E. MAIS-COX, B.A., LL.B.  
COURTNEY A. BAILEY, LL.B.  
KIRK B. ANDERSON, LL.B.  
JERMAINE C. SPENCE, LL.B.  
HYACINTH F. LIGHTBOURNE, BBA, J.D. (MIAMI)

GEORGETTE T. WILTSHIRE, B.A., LL.B.  
PETER W. SIMMONDS, B.Sc., LL.B.  
FRANCINE E. HOWELL-BRYCE, BBA, LL.B. (LIVERPOOL)  
CANDICE T. STEWART, LL.B.  
ROXANNE A. MILLER, LL.B. (LMU)  
TERI-ANNA LAWSON, B.A. LL.B.  
MICHELLE J. PARKER, B.Sc., LL.B., MBA  
COLEEN T. WEISE, LL.B.  
COURTNEY M. WILLIAMS, B.A., LL.B.  
TOPAZ L. M. JOHNSON, B.Sc., LL.B. (LON), M.Sc.  
MARIA L. BURRE, B.A., LL.B., M.Sc.  
SHAUNNA-KAYE CARTER, LL.B.

CONSULTANTS

C. D. R. BOVELL, C.D., M.A., LL.M. (CANTAB)  
DENNIS G. EDMUNDS, B.A. (CANTAB)  
O. A. CAROLAINA, B.A. (SUSSEX)

P.O. BOX 365  
48 DUKE STREET  
KINGSTON  
JAMAICA, W.I.

TELEPHONE: (876) 922-1500  
VoIP (U.S.A.): (678) 202-9818  
TELEFAX: (876) 922-9002  
(876) 924-9106

E-MAIL: info@dunncox.com

WEBSITE: www.dunncox.com

OUR REF. YOUR REF. 19  
WRITER'S EXTENSION NUMBER

October 28, 2009

Chief Investigator  
Office of the Contractor—General  
PIOJ Building  
16 Oxford Road  
P.O. Box 540  
Kingston 5

Attention: Mr. Maurice Barrett

Dear Sirs:

Re: **Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act – Enquiry Into American Air-Lines Guarantee Deal for US\$4.5 Million**

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. BOX 540  
KINGSTON 5, JAMAICA, W.I.

*CMS/We/AC*  
*29/10/09*

**CONFIDENTIAL**

Reference is made to yours dated October 28, 2009.

With regard to Mr. Reid's whereabouts, as stated in my earlier letter of the date instant Mr. Reid is in Montego Bay, as your file note reflects. Nothing about that statement is "highly questionable" or furthermore, inaccurate.

With regard to Mr. Lynch's whereabouts, had your office bothered to be more thorough in its investigation, you would have learned, as we have been instructed, that Mr. Lynch, upon his return into the island on October 29, 2009 is not scheduled to come to Kingston, but rather is scheduled to stay in Montego Bay for the very short period that he will be in Jamaica.

It is unfortunate that your offices saw fit to resort to such tactics by calling clients with the full knowledge that they are represented by counsel, an act which one would consider inappropriate, unacceptable, and "skating" ethical practice.

Further, the writer resents the questioning of her integrity with regard to the accuracy of her statements. Nothing in the writer's letter is inaccurate or misleading and at no point



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in the writer's letter did the writer indicate when either client was scheduled to return to Kingston. Your suggestions to the contrary is a most serious matter and is wholly without merit. We also find it suspect that the basis for such allegations on your part would be a file note of conversations by a member of staff and not conversations had by your good self.

The Office of the Contractor General has submitted numerous requests to Mr. Lynch and Mr. Reid and on each and every occasion, responses have been submitted in the proper form and in the requisite time permitted by your offices.

Considering that both parties are required to properly research their responses and to execute affidavits to attach to their responses, it strains incredulity that you would only seek to give Mr. Reid and Mr. Lynch such a short time period (less than 4 full working days from the date delivery) within which to consult with counsel and to prepare responses to your questions.

Furthermore, the Contractor General Act does not specify requisite time periods within which a person must respond to a requisition of the OCG, just that they are to comply. Accordingly, a reasonable time period must be afforded considering the circumstances.

Accordingly, upon having an opportunity to properly research your request and to properly consult with counsel, Mr. Reid and Mr. Lynch will endeavour to remit their responses within the time allotted.

Yours faithfully,

**DunnCox**

PER:

  
CINDY LIGHTBOURNE



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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ Building  
16 Oxford Road  
P.O. BOX 540  
KINGSTON 5  
JAMAICA, W.I.

No. :

TELEPHONE No.:876-929-8560/6466  
FAX No. : 876-929-2476  
E-mail: Mbarrett@ocg.gov.jm

October 28, 2009

Ms. Cindy Lightbourne  
Attorney-At-Law  
DunnCox  
Attorneys-At-Law  
48 Duke Street  
Kingston

COPY

Dear Ms. Lightbourne:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million**

We write to acknowledge receipt of your letter of even date which was written in response to our faxed letter to you, also of even date.

We hereby, without any equivocation or reservation, repeat and restate to you the contents of our earlier letter to you.

Please note that your reference to Mr. Reid was as follows: "*Mr. Reid is currently (i.e. today) out of town on business*". The clear implication of your letter is that Mr. Reid was/is not in office and, therefore, was/is not in a position to address matters which relate to his official functions of office.

However, Mr. Reid, contrary to your assertions, was, in point of fact, in *his* official office today – albeit not in Kingston. Additionally, he was reported to be in his Kingston office yesterday.

From your statements and assertions, it is also pellucidly evident that you have not taken the time to properly inform yourself of the full import of the specific provisions of the Contractor General Act to which you have been directed. That, however, is your choice and you will do so at your own peril and that of your Clients.

The Requisitions of the OCG are formal Statutory Requisitions and must be addressed with the expedition and seriousness which they clearly deserve.



Only two (2) questions were posed to your Clients. The substantive question relates specifically to an update of information, certain particulars of which your Clients have previously furnished to the OCG and in respect of which they have already, as recently as in the past week, reportedly made formal representations to the Public Administration & Appropriations Committee (PAAC) of Parliament.

You have already been formally advised that the OCG's demand to you and to your Clients is final.

Very respectfully yours,

A handwritten signature in black ink, appearing to read 'M. Barrett', written over a horizontal line.

Maurice Barrett  
Chief Investigator  
for and on behalf of the Contractor General

Cc. Mr. John Lynch, Chairman of the Board, Jamaica Vacations Limited  
Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited



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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

THE OFFICE OF THE CONTRACTOR-GENERAL

PIOJ Building

16 Oxford Road

P.O. Box 540

KINGSTON 5

JAMAICA, W.I.

No. :

TELEPHONE No.: 876-929-8560/6466

FAX No. : 876-929-2476

E-mail: mbarrett@ocg.gov.jm

November 10, 2009

DunnCox  
Attorneys-At-Law  
P.O. Box 365  
48 Duke Street  
Kingston  
Jamaica, W.I.

COPY

Attention: Ms. Cindy Lightbourne - Attorney-At-Law

Dear Sirs:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US\$4.5 Million - Retention of Legal Services by Jamaica Vacations Limited to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act**

We write in particular regard to the Office of the Contractor General's (OCG's) ongoing investigation into the captioned matter and the representations which have been made to the OCG by senior public officials of Jamaica Vacations Limited (JAMVAC), namely: Messrs. John Lynch, Chairman, and Lionel Reid, Executive Director, through their Attorneys-at-Law, DunnCox.

As you are aware, by way of letter which was dated June 9, 2009, the OCG was informed by DunnCox that it now acts *'for and on behalf of Jamaica Vacations Limited (JAMVAC) and the Tourist Enhancement Fund (TEF)'* and that its services were *'retained to assist JAMVAC and TEF with its compliance to the said requests.'*

For the avoidance of doubt, the referenced contract which was consummated between JAMVAC and DunnCox constitutes a government contract within the parameters of the Contractor General Act, and as such falls within the jurisdiction of the OCG.

It is therefore incumbent on me to inform you that the OCG has decided to include, in the captioned Investigation, contractual matters pertaining to the retention of legal services by JAMVAC, insofar as they relate to the OCG's ongoing Investigation.

Consequently, as we will require your assistance and full cooperation to successfully pursue and complete this investigation, and out of an abundance of caution, it is very important that your attention is formally directed to the following provisions of the Contractor General Act:



- (1) Sections 4 (1) (a) (i) and (ii) which mandates the Contractor General, "... on behalf of Parliament- to monitor the award and the implementation of Government contracts with a view to ensuring that such contracts are awarded impartially and on merit (and that) the circumstances in which each contract is awarded ... do not involve impropriety or irregularity ...".
- (2) Section 4 (1) (b) which mandates the Contractor General, "... on behalf of Parliament- to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof".
- (3) Section 15 (1) which prescribes the discretionary power of a Contractor General to conduct an investigation into any or all of the following matters:
  - (a) "the registration of contractors";
  - (b) "tender procedures relating to contracts awarded by public bodies";
  - (c) "the award of any Government contract";
  - (d) "the implementation of the terms of any Government contract";
  - (e) "the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence";
  - (f) "the practice and procedures relating to the grant, issue, suspension or revocation of prescribed licences".
- (4) Section 4 (2) (b) which prescribes the power of a Contractor General "to have access to all books, records, documents, stores or other property belonging to Government, whether in the possession of any officer of a Public Body or a contractor or any other person".
- (5) Section 4 (2) (d) which prescribes the power of a Contractor General "to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession of any public officer or any other person".
- (6) Section 4 (2) (e) which prescribes the power of a Contractor General "to have access to any premises or location where he has reason to believe that any such books, records, documents or other property as are referred to in paragraph (d) or any property which is the subject of a prescribed licence, may be found".
- (7) Section 4 (3) of the Act which prescribes the power of a Contractor General to "require any Public Body to furnish in such manner and at such times as may be specified by the Contractor General, information with regard to the award of any contract and such other information in relation thereto as the Contractor General may consider desirable".
- (8) Section 4 (4) which prescribes that, "For the purposes of paragraphs (d) and (e) of subsection (2) the Contractor-General shall have power to require any public officer or any other person to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the grant, issue, suspension or revocation of any prescribed licence and such other information in relation thereto as the Contractor-General considers desirable".
- (9) Section 5 (1) which provides that, "In the exercise of the powers conferred upon him by this Act, a Contractor-General shall not be subject to the direction or control of any other person or authority".
- (10) Section 17 (1) which prescribes the power of a Contractor General "to adopt whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of (the) Act, to obtain information from such person and in such manner and make such enquiries as he thinks fit".



- (11) Section 17 (2) which provides that "Nothing in this Act shall be construed as requiring a Contractor General to hold any hearing and, no person shall be entitled as of right to comment on any allegations or to be heard by a Contractor General".
- (12) Section 18 (1) which prescribes the power of a Contractor General, "at any time, (to) require any officer or member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in his possession or under the control of that officer, member or other person".
- (13) Section 18 (2) which prescribes the power of a Contractor General "to summon before him and examine on oath any person who has made representations to him or any officer, member or employee of a public body or any other person who, in the opinion of the Contractor General, is able to furnish information relating to the investigation – and such examination shall be deemed to be a judicial proceeding within the meaning of Section 4 of the Perjury Act".
- (14) Section 18 (3) which provides that "For the purposes of an investigation under this Act, a Contractor General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents".
- (15) Section 18 (4) which provides that "Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person under the Official Secrets Act, 1911 to 1939 of the UK (or of any Act of Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor General for the purpose of an investigation ...".
- (16) Section 18 (5) which provides that "No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law."
- (17) Section 22 which provides that, "The proceedings of a Contractor-General shall not be rendered void for want of form".
- (18) Section 29 which provides as follows:
- "Every person who –
- (a) willfully makes a false statement to mislead or attempts to mislead a Contractor General or any other person in the execution of his functions under this Act, or
  - (b) without lawful justification or excuse –
    - (i) obstructs, hinders or resists a Contractor General or any other person in the execution of his functions under this Act; or
    - (ii) fails to comply with any lawful requirement of a Contractor General or any other person under this Act, ....
- shall be guilty of an offence ...".



It is also instructive that you should note that there are Public Officers who are misguided in the belief that the aforementioned powers of the Contractor General, to monitor or to investigate the "award" of contracts etc., do not arise until the subject contract or licence/permit is actually awarded or issued, as the case may be. We are obliged to advise you that any such belief is unfounded and has no validity in law. In the case of *Lawrence v. Ministry of Construction (Works) and the A.G. (1991) 28 J.L.R. 265*, the Supreme Court of Jamaica was moved by way of originating summons, at the instance of the Contractor General, to rule on this very point. Mr. Justice Courtney Orr, in that case, held unequivocally as follows:

*"The proper interpretation of the (Contractor General) Act is one which empowers the Contractor General to monitor the pre-contract stages of government contracts and to obtain information from public bodies prior to the award of such contracts (my emphasis)... The ordinary meaning of the words of the statute in light of the context and grammar suggest no other interpretation".*

In the discharge of the mandates of the Contractor General under the Contractor General Act and in furtherance of the expressed powers which are reserved to him by the Act, the OCG, acting on behalf of the Contractor General, now hereby formally requires you to fully comply with the below-mentioned requisitions by providing all of the information and documentation which is demanded of you and to supply same in a sealed envelope, marked 'Confidential' and addressed to the Contractor General. The envelope must be deposited at the reception desk of the Offices of the Contractor General, PIOJ Building, 16 Oxford Road, Kingston 5, no later than 3:00 PM in the afternoon on Monday, November 16, 2009.

In responding to the below-mentioned requisitions or questions, you are respectfully asked to be guided by the following:

- (a) You must provide written responses to all of the requisitions or questions.
- (b) Your responses must be declared and certified by you before a Justice of the Peace to be complete, accurate and truthful. Your declaration must be in the form which is enclosed herewith.
- (c) All written responses which are provided by you must be provided in a single document and must be numbered in the same chronological sequence as the questions or requisitions to which they relate. For example, your response to Requisition/Question #1 must be numbered '1', your answer to Requisition/Question #2 must be numbered '2', and so forth.
- (d) An electronic copy of your written response must accompany the certified hardcopy. The electronic copy must be provided in a Microsoft word format on a single compact disk.
- (e) Any document which is supplied by you in support of a response must be properly labeled, numbered and marked to identify what it is and the requisition or question to which it relates.
- (f) Should you mislead, resist, obstruct or hinder a Contractor General in the execution of his functions or fail to provide a complete, accurate and truthful response to any of the requisitions or questions which are set out below, you will become liable, *inter alia*, to criminal prosecution under Section 29 of the Contractor General Act.





REQUISITIONS / QUESTIONS

1. Please ascertain and provide responses to the following questions:

- a. Provide an itemized listing of all fees which have been charged to JAMVAC, by DunnCox, in relation to the legal services which have been provided for matters which relate to the OCG's ongoing investigation. The list must include all services rendered, up to and including November 6, 2009, and should include the following:
- i. A detailed description of services which have been rendered;
  - ii. The date(s) on which the listed service(s) were rendered;
  - iii. The cost(s) that are associated with each of the listed services which were rendered;
  - iv. A copy of the invoice which was submitted to/or is to be submitted to JAMVAC in support of the fees paid and/or payable.

Please provide documentary evidence, where possible, in support of your response and any assertions made.

- b. Please indicate the total fees which have been paid to date by JAMVAC insofar as it regards the matter under investigation;
- c. The total fees which remain outstanding and payable by JAMVAC, up to November 6, 2009, in respect of the matter which is under investigation. The response must include the following:
- i. A detailed description of the services which have been rendered;
  - ii. The date(s) on which the listed service(s) were rendered;
  - iii. The cost(s) that are associated with each of the listed services which were rendered;
  - iv. A copy of the invoice which was submitted to/or is to be submitted to JAMVAC in support of the fees paid and/or payable.

Please provide documentary evidence, where possible, in support of your response and any assertions made.

2. Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same.

It is of particular import that we bring your attention to the fact that the Ministry of Tourism (MOT), through its Permanent Secretary, Mrs. Jennifer Griffith, has already provided the OCG with particulars of the government contract which was executed between JAMVAC and DunnCox.

In the instant case, the MOT, by way of letter dated November 6, 2009, has provided the OCG with particulars of the fees which have been charged by DunnCox up to July 16, 2009. Therefore, the Requisition which is made of you requires that the information be made current, to include fees incurred up to November 6, 2009, and that the services rendered and associated fees are disaggregated.

By copy of this letter, the relevant state authorities and government officials, inclusive of the Accounting and Accountable Officers of JAMVAC, the Public Body which has awarded the referenced contract to DunnCox, are hereby



informed of the OCG's requirements of you in respect of the formal provision of information which relates to the retention of the legal services of DunnCox.

We would like to thank you in advance for your full and anticipated cooperation in this endeavor.

Should you have any questions, please do not hesitate to contact me.

Yours sincerely,

Maurice Barrett  
Chief Investigator  
for and on behalf of the Contractor General

Enclosure -Form of Declaration

Copy: The Hon. Bruce Golding, M.P., Prime Minister of Jamaica  
Ambassador Douglas Saunders, Cabinet Secretary  
Dr. Wesley Hughes, C.D., Financial Secretary  
Ms. Pamela Monroe-Ellis, Auditor General  
Dr. Omar Davies, Chairman of the Public Accounts Committee of the Parliament of Jamaica  
Dr. Wykeham McNeil, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica  
Senator the Hon. Dorothy Lightbourne, Attorney General  
The Hon. Edmund Bartlett, Minister of Tourism  
Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism  
Mr. John Lynch, Chairman, Jamaica Vacations Limited  
Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited



Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

REF. No.:11-03

TELEPHONE No. : 929-8560/6466  
FAX No. : 929-2476  
E-Mail : [mbarrett@ocg.gov.jm](mailto:mbarrett@ocg.gov.jm)

**OFFICE OF THE CONTRACTOR-GENERAL**

**PIOJ Building**

**16 Oxford Road**

**P.O. BOX 540**

**KINGSTON 5**

**JAMAICA, W.I.**

**Form of Declaration**

**The Voluntary Declaration Act: Section 7: Declaration to be in form in Schedule:**

I, John Brown, do solemnly and sincerely declare as follows:

- 1. That I am [number] years of age and I reside and have my true place of abode at [address] in the parish of
- 2. That I have answered the questions posed and fulfilled the requisitions made to me in a letter from the Contractor-General dated November 10, 2009, completely, accurately and truthfully.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Voluntary Declarations Act.

TAKEN and ACKNOWLEDGED )  
 by the said JOHN BROWN at [address] )  
   in the parish of )  
 on this            day of    2009 )  
 in the presence of: )

\_\_\_\_\_  
 JOHN BROWN

\_\_\_\_\_  
 JUSTICE OF THE PEACE  
 For the parish of:-



Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

REF. No.:

TELEPHONE No. : 929-8560/6466

FAX No. : 929-7335

E-Mail: gchristie@ocg.gov.jm

**OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ BUILDING**

**16 OXFORD ROAD**

**P.O. BOX 540**

**KINGSTON 5**

**JAMAICA, W.I.**

November 10, 2009

The Honourable Orette Bruce Golding, M.P.  
Prime Minister  
Office of the Prime Minister  
1 Devon Road  
Kingston 10

Dear Prime Minister:

I am privileged to write directly to you to convey a copy of the enclosed letter.

I avail myself of this opportunity to renew to you the assurance of my highest considerations.

Very respectfully yours,

---

Greg Christie  
Contractor General

Enclosure

LINCOLN A. C. EATMON  
 JOHN G. LEIRA  
 JANICE A. CALSWELL  
 W. JOHN VASSELL, Q.C., LL.B.  
 ERIC F. CHAM, B.Sc. (ECON)  
 JEROME L. LEE, B.Sc. (GOVT.), LL.B.  
 JANET K. MORRISON, LL.B., LL.M.  
 MARGARET A. MOORE-JERVIS, LL.B.  
 KATHLEEN A. FUNDLAY, LL.B.  
 HELEN E. EVELYN, LL.B.  
 JOANNE E. WOOD, LL.B.  
 DONOVAN C. WALKER, LL.B., LL.M. (LON)  
 JULIANNE E. MAISON, B.A., LL.B.  
 COURTNEY A. BARKLEY, LL.B.  
 ERIC B. ANDERSON, LL.B.  
 JERMAINE C. SPENCE, LL.B.  
 RYANNE F. LIGHTFOURNE, BBA, J.D. (MIAMI)

GEORGETTE T. WILTSHIRE, B.A., LL.B.  
 PETER W. SIMONDS, B.Sc., LL.B.  
 FRANCINE E. HOWELL-BUTCH, BBA, LL.B. (LIVERPOOL)  
 CANDICE T. STEWART, LL.B.  
 ROMANNE A. MILLER, LL.B. (LOND)  
 TERRY ANN A. LAWSON, B.A., LL.B.  
 MICHELLE J. PARKER, B.Sc., LL.B., MBA  
 COLLEEN T. WEISS, LL.B.  
 COURTNEY M. WILLIAMS, B.A., LL.B.  
 TOPAZI L. JOHNSON, B.Sc., LL.B. (LON), M.Sc.  
 MARIA L. BURREY, B.A., LL.B., M.Sc.  
 SHAINNA-KAY E. CARTER, LL.B.

**CONSULTANTS**  
 C. D. E. BOVELL, C.D., M.A., LL.M. (CANBAS)  
 DENNIS G. EDWARDS, B.A. (CANBAS)  
 O. A. CAROL ANNA, B.A. (SUSSEX)

P.O. BOX 865  
 48 DUNE STREET  
 KINGSTON  
 JAMAICA, W.I.

TELEPHONE: (876) 922-1500  
 FAX (U.S.A.): (876) 202-9818  
 TELEFAX: (876) 922-5002  
 (876) 924-9106

E-MAIL: info@dunncox.com  
 WEBSITE: www.dunncox.com

LACE/jab  
 YOUR REF.

OUR REF.

WRITER'S EXTENSION NUMBER

November 13, 2009

By Fax (929-2476), By E-mail and By Bearer

The Office of the Contractor-General  
 PIOJ Building  
 16 Oxford Road  
 Kingston 5

OFFICE OF THE CONTRACTOR-GENERAL  
 1ST FLOOR, PIOJ BUILDING  
 16 OXFORD ROAD  
 P.O. BOX 540  
 KINGSTON 5, JAMAICA, W.I.

Attention: Mr. Maurice Barrett, Chief Investigator

Dear Sirs:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act – Enquiry into Alleged American Airlines Air-Lift Guarantee Deal for US\$4.5 Million – Retention of Legal Services by Jamaica Vacations Limited to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act**

We acknowledge receipt of your letter dated November 10, 2009 wherein you (*inter alia*) make certain requisitions of this firm, which requisitions are set out on pages 5 and 6 of your letter.

DunnCox is willing to cooperate with the Office of the Contractor General and we are ever mindful of the provisions of the Contractor General Act as well as the various powers, duties and responsibilities attendant with the Office of the Contractor General. We stand willing to comply with all valid, reasonable and lawful requisitions of your good office.

In relation to the requisitions/questions in your November 10<sup>th</sup> letter, we set out our initial responses thereto as follows:



A member of  
**TERRALEX**  
 The Worldwide Network of Independent Law Firms

*Handwritten:* 11/13/09  
 RESPONSE  
 C. P. [Signature]  
 NOV 13 2009

1. As you are aware, we have provided legal services from June 2009 to Jamaica Vacations Limited (JAMVAC) based upon a very specific retainer, that is, to assist JAMVAC with its compliance with the various requests to it by your office as regards the alleged American Airlines Air Lift Guarantee for US\$4.5 Million matter. As Attorneys-at-Law, we have legally binding professional duties to our clients which constrains us from disclosing any information to third parties (including the Office of the Contractor-General) without our Client's written consent first had and obtained. We are certain you appreciate that legal professional privilege attaches to all correspondence and documentation between DunnCox and our clients and, generally, the sanctity of such privilege remains paramount in our jurisdiction. Therefore, before we can even consider responding to your request, we will firstly have to discuss your request with our Client who will instruct if they are willing to waive legal privilege to facilitate our releasing information to you as requested. We are in the process of doing this. Should we be provided with such waiver of privilege, we may then be in a position to respond further to your requisitions.

2. We note that your November 10, 2009 letter makes reference to our letter of June 9, 2009 to the Office of the Contractor General wherein we advised your office (*inter alia*) that we act for and on behalf of JAMVAC and that our services were retained by our Client to assist them with their fulsome compliance to your formal requisitions pertaining to the American Airlines Air Lift Guarantee for US\$4.5 Million. Your November 10<sup>th</sup> letter also makes reference to the fact that you are already in possession of our engagement letter with our Client dated June 8, 2009 as well as a copy of our first invoice dated the August 3, 2009 for services rendered to our Client. Based on the aforesaid, if the correspondence in your possession is carefully reviewed, you must be fully aware and appreciate that the scope of our retainer is very limited and had absolutely nothing to do with the entering into or operation of the alleged American Airline Airlift Guarantee Deal for US\$4.5 Million itself (which, as we understand, is the subject of your investigations). Our retainer remains very limited to providing services to our Client in formulating and providing responses to your requisitions for information and documentation to be supplied pursuant to the Contractor General Act. Our understanding is that to date all requisitions from your office have been fully answered and (we trust) satisfied. Our retainer never extended to nor were we at any time involved with or instructed by JAMVAC or any other entity in relation to the entering into or operation of the alleged American Airlines Air-Lift Guarantee Deal for US\$4.5 Million. Based on the above, the decision of your office to now expand your captioned investigations to "include" in your investigations and enquiry into the alleged American Airlines Air-Lift Guarantee Deal for US\$4.5M "contractual matters pertaining to the retention of legal services by JAMVAC, insofar as they relate to the OCG's on-going investigation" are, in our opinion overreaching and misconceived. DunnCox had absolutely nothing to do with the alleged American Airlines Air-Lift Guarantee Deal for US\$4.5M

16 O'FARREY ROAD  
 OFFICE OF THE CONTRACTOR GENERAL  
 150-155 BROADWAY  
 KINGSTON 5, JAMAICA, W.I.

and as such we are unable to assist with the on-going investigations of the Office of the Contractor General upon and in relation to that matter.

3. Generally, we must comment adversely on the attempt by your good office to cast a wide net by expanding your investigation without properly substantiating or even offering a reasonable basis for your so doing, particularly when the immediate effect of any compliance with your requisition would place us in the invidious position of breaching attorney/client privilege.
4. You have advised that you have already received from the Ministry of Tourism copies of the "particulars of the Government contract that was executed between JAMVAC and DunnCox" (which we presume is a reference to our engagement letter) and you indicate that you have to hand particulars of the fees which were charged by DunnCox up to July 16, 2009. You therefore have in your possession all documentation pertaining to the engagement of DunnCox's services and all bills or invoices which have been issued by DunnCox to JAMVAC pertaining to the abovecaptioned matter. As we indicated to you, in relation to your requisitions up to November 6, 2009, we require our client's written authorization.
5. Kindly clarify for us the basis/rationale on which your office has decided to include in its investigations into the alleged American Air-Lift Guarantee Deal for US\$4.5M contractual matters pertaining to the retention in June 2009 of non-routine legal services by JAMVAC to assist it in responding to and complying with the requests of the Office of the Contractor General. We fail to see how our engagement and/or provision of these services are related to the investigation of the alleged American Airlines Air-Lift Guarantee deal of US\$4.5 million. We will appreciate your clarification as to why this information is sought.
6. Could you kindly clarify for us the basis/rationale on which your office has decided to include in its captioned investigation contractual matters pertaining to the retention of legal services by JAMVAC as regards our Clients seeking the services of DunnCox? We fail to see how our engagement and/or provision of these services are related to the investigation of the alleged American Airlines Air-Lift Guarantee deal of US\$4.5 million. We will appreciate your clarification as to why this information is sought. In the interim, and in the event your requisitions pertain to the procurement of legal services, we direct your attention to Regulation 4. (1) (g) of the Public Sector Procurement Regulations 2008 under The Contractor General Act, Dated December 12, 2008, Circular No. 35 dated the 22<sup>nd</sup> day of September, 2008 from the Ministry of Finance and the Public Service as well as letter dated September 30, 2009 from Honourable Minister of Justice and Attorney General to the Chairman of the General Legal Council advising of procurement guidelines for legal Services by GOJ entities which all, inter alia, make it clear that legal

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 services for non-routine legal assignments are exempted from procurement procedures.

7. Based on the above we are compelled to advise that it may not be possible to answer your requisitions (or even be in a position to do so), much less by the deadline of Monday November 16, 2009 which has been unilaterally imposed.

We stand willing to meet with you as regards the above issues and your requisition (subject to client instruction) and, in the interim look forward to your full consideration and early response to the various issues raised herein by us.

Yours faithfully,

**DunnCox**

Per: 

LINCOLN A.C. EATMON

- cc: The Hon. Bruce Golding, M.P., Prime Minister of Jamaica  
 cc: Ambassador Douglas Saunders, Cabinet Secretary  
 cc: Dr. Wesley Hughes, C. D., Financial Secretary  
 cc: Ms. Pamela Monroe-Ellis, Auditor General  
 cc: Dr. Omar Davies, Chairman of the Public Accounts Committee of the Parliament of Jamaica  
 cc: Dr. Wykeham McNeil, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica  
 cc: Senator the Hon. Dorothy Lightbourne, Attorney General  
 cc: The Hon. Edmund Bartlett, Minister of Tourism  
 cc: Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism  
 cc: Mr. John Lynch, Chairman, Jamaica Vacations Limited  
 cc: Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited

Lincoln A.C. Eatmon  
 Director  
 100-090 1000  
 P.O. Box 540  
 KINGSTON 5, JAMAICA, W.I.





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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

THE OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ Building  
16 Oxford Road  
P.O. BOX 540  
KINGSTON 5  
JAMAICA, W.I.

No. :

TELEPHONE No.:876-929-8560/6466  
FAX No. : 876-929-2476  
E-mail: gchristie@ocg.gov.jm

November 16, 2009

DunnCox  
Attorneys-At-Law  
P.O. Box 365  
48 Duke Street  
Kingston  
Jamaica, W.I.

COPY

Attention: Mr. Lincoln Eatmon, Esq.

Dear Sirs/Mesdames:

Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million - Retention of Legal Services by Jamaica Vacations Limited to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act

We write in acknowledgement of our receipt of your letter of November 13, 2009 in the captioned regard, which was brought to my attention this morning following my return to the island last night. Your letter, which was faxed to the Office of the Contractor General (OCG) on the 13th instant, was written in direct response to the lawful Statutory Requisition of the OCG which was conveyed to you on November 10, 2009.

We have carefully perused your letter and must confess that we are surprised at the questions which you have raised as well as the positions which you have asserted, some of which would seem to infer that you are seeking to direct a Contractor General in the lawful discharge of his functions under the Contractor General Act.

With the deepest of respect, your assertions and questions would suggest that either you have not read the Contractor General Act or, if you have read it, you are not in agreement with its provisions. We have been cautiously persuaded towards this view, as we are reluctant to accept that you have read the Act but are incapable of understanding what you have read.

In the premises, and while we do not intend to repeat any of the terms of the OCG's lawful Statutory Requisition to you, nor the provisions of the written law upon which it is founded, we believe that it is critically important that we should formally respond to the key issues which you have raised and re-emphasize to you the non-negotiable positions of the OCG in this matter.

1. First, and as a general point, it is important to recognize that the matter which is before us is a Public Law issue. It involves, *inter alia*, the award of a Government Contract by a Public Body to you, a Government Contractor.



As a matter of law, and by virtue of the expressed terms of the Contractor General Act, the jurisdiction to monitor and/or to investigate the award or termination of this contract, and/or your implementation and performance of same, and matters that are associated therewith, has accordingly fallen to the OCG.

The issue, therefore, is not, as you would seem to believe, a private and confidential matter between yourself and your Clients. Sections 2, 4, 15, 16, 18 (1), 18 (2), 18 (3), 18 (4) and 29 (b) of the Contractor General Act, in particular, makes this very clear.

Indeed, the matter before you is anything but a private or confidential one, for it must also be stressed that the funds which are the subject of the OCG's Statutory Requisition to you, belong neither to your Clients to do as they please, nor do they belong as of right to you.

They belong, instead, to the Taxpayers and People of Jamaica and they must be properly accounted for by reference, *inter alia*, to the Government contract award, implementation and termination principles that are expressly prescribed by Section 4 (1) (a) of the Contractor General Act.

2. Second, your letter has curiously questioned the propriety and the lawful authority of a Contractor General to investigate the Government contract which has been awarded to you.

With the deepest of respect, we do not think that this merits a response save and except to say that you may wish to be guided by the very clear and expressed provisions that are contained in Sections 5 (1), 15 (1), and 16 of the Contractor General Act.

3. The discretionary investigative powers of a Contractor General in this matter, together with the statutory and judicial authority of a Contractor General to lawfully compel your production of any information and documentation in such manner and at such times as a Contractor General shall alone deem fit, are matters which are clearly and unambiguously outlined in the Contractor General Act.

The OCG does not require your prior approval to investigate the Government contract which has been awarded to you, nor does it require your concurrence to determine what information or documentation it can lawfully require from you and the time within which said information and documentation must be produced by you.

You will find that Sections 4, 5 (1), 15 (1), 16, 17 (1), 17 (2), 18, and 29 of the Act will be more than instructive on the above-referenced matters.

4. You have posited the argument that the procurement of non-routine legal services has been exempted from the ambit of the Government Procurement Regulations.

Although this may be so, it should have been apparent to you that the jurisdiction of a Contractor General under Sections 4, 15, 16, 17 and 18 of the Contractor General Act, to monitor and to investigate Government contracts for the provision of legal services, has not in any way been fettered or disturbed by the subject Regulations.

You may have overlooked the matter of this small distinction which has its root in one of the most fundamental principles of law, for we are absolutely sure that you are not unmindful of the preeminence that an Act of Parliament holds over a Statutory Regulation.



5. Lastly, you have raised the issue of Attorney/Client privilege. You are apparently of the view, and perhaps, on the face of things, understandably so, that unless Mr. John Lynch or Mr. Lionel Reid gives you their go-ahead, you will be barred from providing the OCG with the particulars of the services that you have rendered in the referenced matter and the legal fees which are to be charged by you therefor.

However, if your proposition is taken to its logical conclusion, then what you are in fact saying is that Mr. John Lynch and Mr. Lionel Reid, who are public servants, can lawfully withhold the permission which you say you are seeking from them and, by so doing, effectively conceal from the OCG, and from the Jamaican Public, just how much of the Taxpayers' money is being spent by them with you and for what.

The OCG is not entirely certain if this is the sort of argument that you or your Clients, or your Clients' superiors, are prepared to publicly advance and defend.

Be that as it may, and in so far as the applicable law is concerned, we have already addressed this issue in the opening paragraphs of our letter. We have directed you to the very germane and unequivocal provisions of Section 18 (4) of the Contractor General Act which, unless you are prepared to challenge the supremacy of the Parliament of Jamaica, will put the matter beyond debate.

In the premises, if you or your Clients are still held to the mistaken notion that you or they are lawfully entitled to withhold any or all of the information which has been formally requisitioned from you, I would respectfully advise that you disabuse your minds of it.

Indeed, and out of an abundance of caution, I will, by way of copy of this letter, formally bring the OCG's positions to the attention of your Clients and to the attention of the Permanent Secretary in the Ministry of Tourism, who is the lawful Government Accounting Officer in this matter. I will do this so that the requisite steps can be jointly taken by you and by them to ensure that the OCG's Requisition to you is fully complied with no later than 12:00 Noon on Wednesday, November 18, 2009.

In closing, I must once again remind you and your Clients that this is a matter which involves a public contract and public funds. It is not a personal, private or confidential matter between Mr. John Lynch, Mr. Lionel Reid and your good-selves.

It is a matter in respect of which your Clients, who are public servants and/or public bodies, are paid and/or funded by the Jamaican Taxpayer. They are publicly accountable under the law for what they do in the discharge of their public functions and, in particular, what they do in their expenditure of public funds.

The matter before us is also one in respect of which a private law firm, DunnCox, has been awarded a "Government contract" within the meaning of Section 2 of the Contractor General Act.

In consequence, DunnCox, whose fees are now being paid out of public funds, is also accountable under the law to the OCG for its implementation and performance of the referenced contract. I can understand your discomfort about this, but you should appreciate that even law firms are bound by the duly promulgated laws of the Parliament of Jamaica.

It is critically important that neither you nor your Clients should lose sight of these pivotal and determinant circumstances, lest you do so to your detriment.



With that said, I am only left to caution you, and to do so with the greatest of respect, by advising you that the OCG does not intend to stand idly by and permit the lawful discharge of its mandates under the Contractor General Act to be obstructed or resisted by any person, entity or authority.

The OCG, therefore, anticipates your full and timely compliance with its Statutory Requisition and wishes to thank you in advance for your kind, considered and unconditional cooperation in this matter.

Very respectfully,

---

Greg Christie  
Contractor General

Copy: Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism  
Mr. John Lynch, Chairman, Jamaica Vacations Limited  
Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited  
The Hon. Edmund Bartlett, Minister of Tourism

The Hon. Bruce Golding, MP, Prime Minister of Jamaica  
Ambassador Douglas Saunders, CD, Cabinet Secretary  
Dr. Wesley Hughes, CD, Financial Secretary  
Ms. Pamela Monroe-Ellis, Auditor General  
Dr. Omar Davies, MP, Chairman of the Public Accounts Committee of the Parliament of Jamaica  
Dr. Wykeham McNeil, MP, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica  
Senator the Hon. Dorothy Lightbourne, Attorney General

**DunnCox**

**ATTORNEYS-AT-LAW, NOTARIES PUBLIC, PATENT & TRADE MARK AGENTS**

# FAX COVER SHEET

P.O. BOX 385  
48 Duke Street,  
Kingston,  
Jamaica W.I. **39**

TELEPHONE: (876) 922-1500

TELEFAX: (876) 922-8002

CABLE: "DUNCOX"  
"L.L.K. Jamaica"

E-MAIL: info@dunncox.com

WEB SITE:  
www.dunncox.com

**DATE:** November 18, 2009 **TIME:** 5:02 pm

**TO :** Mr. Greg Christie  
**COMPANY NAME :** Office of the Contractor General  
**FAX NUMBER :** 929-2476  
**FROM :** Mr. Lincoln Eatmon  
**MESSAGE :** Notice of Formal Requisition for Information and Documentation to be Supplied Under the Contractor General Act

Please see attached letter of even date with enclosures for your kind attention.

OFFICE OF THE CONTRACTOR-GENERAL  
 1ST FLOOR, P.O. BUILDING  
 16 OXFORD ROAD  
 P.O. Box 540  
 KINGSTON 5, JAMAICA, W.I.

*MB (GC)*  
*TGM*  
*S. LO*  
*18/11/09*

**This transmission consists of 9 pages including this cover sheet.**

**If this transmission is illegible, please contact the sending operator mentioned below at (876) 922-1500.**

**SENDING OPERATOR : J. Sinclair**

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LINCOLN A. C. EATMON  
 JOHN G. DEBRA  
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 ERIC F. CHAN, B.Sc. (ECON)  
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CONSULTANTS  
 C. D. R. BOVELL, C.D., M.A., LL.B. (CANTAB)  
 DENNIS G. EDMUNDS, LL.B. (CANTAB)  
 WILLIAM D. PANTON  
 G. A. CAROLINA, LL.B. (SUSSEX)

P.O. BOX 365  
 48 DUKE STREET  
 KINGSTON  
 JAMAICA, W.I.  
 TELEPHONE: (876) 922 - 1500  
 VOIP (U.S.A.): (773) 202 - 9818  
 TELEFAX: (876) 922 - 9002  
 (876) 924 - 9106  
 E-MAIL: info@dunncoz.com  
 WEBSITE: www.dunncoz.com

LACE/jab  
 CHR REP. YOUR REP.  
 WRITER'S EXTENSION NUMBER

40

November 18, 2009

**WITHOUT PREJUDICE**

Office of the Contractor General  
 1<sup>st</sup> Floor, PIOJ Building  
 16 Oxford Road  
 Kingston 5

OFFICE OF THE CONTRACTOR-GENERAL  
 1<sup>ST</sup> FLOOR, PIOJ BUILDING  
 16 OXFORD ROAD  
 P.O. Box 540  
 KINGSTON 5, JAMAICA, W.I.

**Attention: Mr. Greg Christie, Contractor General**

Dear Sirs:

**RE: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act – Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for USS4.5 Million – Retention of Legal Services by Jamaica Vacations Limited to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act**

We acknowledge receipt of yours dated November 16, 2009, the contents of which are duly noted, but we respectfully disagree with certain assertions therein.

As we indicated in our letter dated November 13, 2009 in order for us to respond to your requisitions we are duty bound to first obtain our client's written instructions so to do. We have now received our client's instructions to provide you with the responses to the requisitions in your aforesaid letter.

Based solely on our client's instructions, please find enclosed herewith:

1. Responses of Hyacinth Lightbourne in response to the requisitions dated November 10, 2009 by the Office of the Contractor General regarding American Airlines Air-Lift Agreement; and



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2. Form of Voluntary Declaration duly executed by Hyacinth Lightbourne.

It is important for you to realize that we continue to stand by the positions set out in our letter dated November 13, 2009 (inter alia) relating to legal professional privilege. Therefore, our response to your requisitions must not be construed as a departure from our correctly stated positions as set out in our letter dated November 13, 2009.

As a separate issue, we reserve all rights pertaining to the issues raised in our letter of November 13, 2009 (particularly the general principles as regards legal professional privilege and the exemption from the procurement process of non-routine legal services) which we trust you will agree is generally of such importance that we should deal fully with this issue at another time and perhaps in another forum.

We trust the attached responses satisfy your requisitions and we reiterate our commitment to work with and assist the Contractor General in the proper discharge of the rights, duties and obligations of that office.

Kindly acknowledge safe receipt of the enclosed documents by signing and returning copy letter hereof.

Yours faithfully,

**DunnCox**

Per: 

LINCOLN A.C. EATMON

Enc.

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

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**RESPONSES OF HYACINTH  
LIGHTBOURNE IN RESPONSE TO  
THE REQUISITIONS DATED  
NOVEMBER 10, 2009 BY THE  
OFFICE OF THE CONTRACTOR  
GENERAL  
REGARDING AMERICAN AIRLINES  
AIR-LIFT AGREEMENTS**

---

OFFICE OF THE CONTRACTOR-GENERAL  
1st FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.



RESPONSES OF HYACINTH LIGHTBOURNE IN RESPONSE TO  
THE REQUISITIONS DATED NOVEMBER 10, 2009 BY THE  
OFFICE OF THE CONTRACTOR GENERAL  
REGARDING AMERICAN AIRLINES AIR-LIFT AGREEMENTS

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1. Please ascertain and provide responses to the following questions.
  - a. Provide an itemized listing of all fees which have been charged to JAMVAC, by DunnCox in relation to the legal services which have been provided for matters which relate to the OCG's ongoing investigation. The list must include all services rendered, up to and including November 6, 2009, and should include the following:
    - i. A detailed description of services which have been rendered;
    - ii. The date(s) on which the listed services were rendered;
    - iii. The cost(s) that are associated with each of the listed services which were rendered;
    - iv. A copy of the invoice which was submitted to / or is to be submitted to JAMVFAC in support of the fees paid and/or payable.

Please provide documentary evidence, where possible, in support of your response and any assertions made.

As the Office of the Contractor General is in possession of our Statement of Charges dated August 3, 2009 for the period June 8, 2009 to July 16, 2009, the following is a listing of the services rendered from July 17, 2009 to November 6, 2009.

1. Telephone conversation between Ms. Cindy Lighthourne, Attorney at DunnCox and Mr. John Lynch, Chairman, Jamaica Vacations Limited on August 11<sup>th</sup>, 2009.
2. Drafting and sending letter to the Office of the Contractor General, Mr. Maurice Barrett, Chief Investigator enclosing Response of Mr. John Lynch in Response to the Requisitions dated July 21<sup>st</sup>, 2009 by the OCG, and Response of Mr. Lionel Reid in Response to the Requisitions dated July 21<sup>st</sup>, 2009, and compact disk containing the said Responses.

OFFICE OF THE CONTRACTOR-GENERAL  
100 P.O. BOX BUILDING  
10 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

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RESPONSES OF HYACINTH LIGHTBOURNE IN RESPONSE TO  
THE REQUISITIONS DATED NOVEMBER 10, 2009 BY THE  
OFFICE OF THE CONTRACTOR GENERAL  
REGARDING AMERICAN AIRLINES AIR-LIFT AGREEMENTS

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3. Telephone conversation between Ms. Cindy Lightbourne and Mr. Lionel Reid, Executive Director of Jamaica Vacations Limited on September 30<sup>th</sup>, 2009.
4. Receiving and perusing fax letter on September 30<sup>th</sup>, 2009 from Ms. Geraldine Wright of Jamaica Vacations Limited regarding letter sent to Mr. John Lynch, Chairman of Jamaica Vacations Limited, from the Office of the Contractor-General dated September 28<sup>th</sup>, 2009.
5. Drafting and sending email to Mr. John Lynch, and Mr. Lionel Reid, Chairman and Executive Director, respectively, both of Jamaica Vacations Limited on September 30<sup>th</sup>, 2009.
6. Telephone conversation between Ms. Cindy Lightbourne, Attorney at DunnCox and Ms. Hisani Chisholm, Special Investigator, Office of the Contractor-General on October 1<sup>st</sup>, 2009.
7. Telephone Conversation between Ms. Cindy Lightbourne and Mr. Lionel Reid, Executive Director of Jamaica Vacations Limited on October 1<sup>st</sup>, 2009.
8. Drafting and sending letter to Ms. Hisani Chisholm, Special Investigator, Office of the Contractor-General on October 1<sup>st</sup>, 2009 requesting an extension of time in order for Mr. John Lynch, Chairman of Jamaica Vacations Limited to respond to Requisition.
9. Receiving and perusing letter from the Office of the Contractor-General on October 5<sup>th</sup>, 2009 granting extension.
10. Travelling to the Office of Jamaica Vacation Limited and meeting with Mr. John Lynch, Chairman on October 5<sup>th</sup>, 2009.
11. Receiving and perusing copy letter dated October 23<sup>rd</sup>, 2009 addressed to Mr. John Lynch, and Mr. Lionel Reid, Chairman and Executive Director respectively of Jamaica Vacations Limited.
12. Drafting and sending letter to Ms. Hisani Chisholm, Special Investigator, Office of the Contractor-General on October 7<sup>th</sup>, 2009 enclosing Response of Mr. John Lynch, Chairman of Jamaica Vacations Limited in Response to the Requisition dated September 28<sup>th</sup>, 2009 and compact disk containing the said Response.
13. Telephone conversation between Ms. Cindy Lightbourne, Attorney at DunnCox and Ms. Hisani Chisholm, Special Investigator, Office of the Contractor-General on October 28<sup>th</sup>, 2009.

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA. W.I.

**RESPONSES OF HYACINTH LIGHTBOURNE IN RESPONSE TO  
THE REQUISITIONS DATED NOVEMBER 10, 2009 BY THE  
OFFICE OF THE CONTRACTOR GENERAL  
REGARDING AMERICAN AIRLINES AIR-LIFT AGREEMENTS**

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14. Drafting and sending letter to Ms. Hisani Chisholm, Special Investigator on October 28<sup>th</sup>, 2009.
  15. Receiving and perusing fax letter dated October 28<sup>th</sup>, 2009 from Mr. Maurice Barrett, Chief Investigator of the Office of the Contractor-General.
  16. Drafting and faxing response letter to Mr. Maurice Barrett, Chief Investigator, Office of the Contractor-General on October 28<sup>th</sup>, 2009.
  17. Drafting and sending letter to Ms. Hisani Chisholm, Special Investigator Office of the Contractor-General on October 30<sup>th</sup>, 2009 delivering Response of Mr. Lionel Reid, Executive Director, of Jamaica Vacations Limited in Response to the Requisition dated October 23<sup>rd</sup>, 2009 and compact disk containing the said Response.
  18. Drafting and sending letter to Ms. Hisani Chisholm, Special Investigator Office of the Contractor-General on November 2<sup>nd</sup>, 2009 enclosing Response of Mr. John Lynch, Chairman, Jamaica Vacations Limited in response to Requisition dated October 23<sup>rd</sup>, 2009 and compact disk containing the said Response.
  19. Receiving and perusing two (2) copy letters dated November 3<sup>rd</sup>, 2009 addressed to Mr. John Lynch, and Mr. Lionel Reid, Chairman and Executive Director respectively, both of Jamaica Vacations Limited.
- The total fees associated with the aforementioned charges are as follows:  
Attorney's Fees      \$ 147,780.00
  - The Cost of each service is determinate upon the time necessary to complete the task. We bill in ten-minute increments.
  - No Statement of Charges has been submitted to JAMVAC save and except that dated August 3, 2009 which is in your possession.

**b. Please indicate the total fees which have been paid to date by JAMVAC  
insofar as it regards the matter under investigation;**

To date, JAMVAC has paid DunnCox the sum of \$294,144.20.

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**RESPONSES OF HYACINTH LIGHTBOURNE IN RESPONSE TO  
THE REQUISITIONS DATED NOVEMBER 10, 2009 BY THE  
OFFICE OF THE CONTRACTOR GENERAL  
REGARDING AMERICAN AIRLINES AIR-LIFT AGREEMENTS**

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c. The total fees which remain outstanding and payable to JAMVAC, up to November 6, 2009, in respect of the matter which is under investigation. The response must include the following:

- i. A detailed description of services which have been rendered;
- ii. The date(s) on which the listed services were rendered;
- iii. The cost(s) that are associated with each of the listed services which were rendered;
- iv. A copy of the invoice which was submitted to / or is to be submitted to JAMVAC in support of the fees paid and/or payable.

Please provide documentary evidence, where possible, in support of your response and any assertions made.

At present no fees remain outstanding and/or are payable.

2. Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on the record? If yes, please provide full particulars of same.

No.

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
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P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

# Form of Declaration

## The Voluntary Declaration Act: Section 7: Declaration to be in form in Schedule:

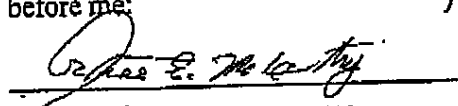
I, **HYACINTH LIGHTBOURNE**, do solemnly and sincerely declare as follows:

1. That I am a Partner of the firm of Messrs. DunnCox, 48 Duke Street, Kingston.
2. That I have answered the questions posed and fulfilled the requisitions made to me in a letter from the Contractor-General dated November 10, 2009, completely, accurately, and truthfully.
3. That the answers to the said questions posed are attached hereto.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Voluntary Declarations Act.

SWORN to by the said )  
**HYACINTH LIGHTBOURNE** )  
 at <sup>48 Duke St</sup> 18<sup>th</sup> day of November )  
 on the \_\_\_\_\_ day of \_\_\_\_\_, 2009 )  
 before me: )

  
**HYACINTH LIGHTBOURNE**

  
**JUSTICE OF THE PEACE:**  
 For the parish of:- *Kingston*

OFFICE OF THE CONTRACTOR-GENERAL  
 1st FLOOR, PIOJ BUILDING  
 16 OXFORD ROAD  
 P.O. Box 540  
 KINGSTON 5, JAMAICA, W.I.



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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

THE OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ Building  
16 Oxford Road  
P.O. BOX 540  
KINGSTON 5  
JAMAICA, W.I.

No. :

TELEPHONE No.:876-929-8560/6466  
FAX No. : 876-929-2476  
E-mail: mbarrett@ocg.gov.jm

November 19, 2009

DunnCox  
Attorneys-At-Law  
P.O. Box 365  
48 Duke Street  
Kingston  
Jamaica, W.I.

COPY

Attention: Mr. Lincoln Eatmon, Esq.

Dear Sirs/Mesdames:

Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act- Enquiry Into Alleged American Airlines Air-Lift Guarantee Deal for US \$4.5 Million - Retention of Legal Services by Jamaica Vacations Limited to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act

We write in acknowledgement of your letter of November 18, 2009 in the captioned regard, which came to hand, via fax, on Wednesday, November 18, 2009, and under cover of which you have provided your duly sworn response to the lawful Statutory Requisition of the Office of the Contractor General (OCG), which was dated November 10, 2009.

We ask that you accept our appreciation for your cooperation in this matter.

We must note, however, for the record, that while you have provided a response to our lawful Statutory Requisition of you in the instant matter, it is nevertheless apparent that you have still not grasped the full import of the provisions of the Contractor General Act as they are lawfully applicable to you as well as to other persons, entities and authorities.

In view of this, we believe that it is important for you to be aware that should DunnCox, in the future, become the subject of the OCG's attention under the Contractor General Act, the positions which were conveyed by us, to you, in our letter of November 16, 2009, will be fully enforced against you without condition.

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DunnCox  
Attorneys-At-Law

Attention: Mr. Lincoln Eatmon, Esq.

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We ask that you be guided accordingly.

Very respectfully,

A handwritten signature in cursive script, appearing to read "M. Barrett", written over a horizontal line.

Maurice Barrett  
Chief Investigator  
**For and on Behalf of the Contractor General**

Copy: Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism  
Mr. John Lynch, Chairman, Jamaica Vacations Limited  
Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited  
The Hon. Edmund Bartlett, Minister of Tourism

The Hon. Bruce Golding, MP, Prime Minister of Jamaica  
Ambassador Douglas Saunders, CD, Cabinet Secretary  
Dr. Wesley Hughes, CD, Financial Secretary  
Ms. Pamela Monroe-Ellis, Auditor General  
Dr. Omar Davies, MP, Chairman of the Public Accounts Committee of the Parliament of Jamaica  
Dr. Wykeham McNeil, MP, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica  
Senator the Hon. Dorothy Lightbourne, Attorney General



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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

REF. No.:

TELEPHONE No. : 929-8560/6466

FAX No. : 929-7335

E-Mail: gchristie@ocg.gov.jm

**OFFICE OF THE CONTRACTOR-GENERAL**

**PIOJ BUILDING**

**16 OXFORD ROAD**

**P.O. Box 540**

**KINGSTON 5**

**JAMAICA, W.I.**

November 19, 2009

The Honourable Orette Bruce Golding, M.P.  
Prime Minister  
Office of the Prime Minister  
1 Devon Road  
Kingston 10

Dear Prime Minister:

I am privileged to write directly to you to convey a copy of the enclosed letter.

I avail myself of this opportunity to renew to you the assurance of my highest considerations.

Very respectfully yours,

---

Greg Christie  
Contractor General

Enclosure



LINCOLN A. C. EATMON  
 JOHN G. LEIBA  
 JANICE A. CAUSWELL  
 W. JOHN VASSELL, Q.C., LL.B.  
 ENID F. CHIN, B.Sc. (ECON)  
 JEROME L. LEE, B.Sc. (GOVT.), LL.B.  
 JANET E. MORRISON, LL.B., LL.M.  
 MARGARET A. MOODIEJERVIS, LL.B.  
 PAULINE A. FINDLAY, LL.B.  
 HELEN E. EVELYN, LL.B.  
 JOANNE E. WOOD, LL.B.  
 DONOVAN C. WALKER, LL.B., LL.M. (LON)  
 LIANNE E. MAIS-COX, B.A., LL.B.  
 COURTNEY A. BAILEY, LL.B.  
 KIRK B. ANDERSON, LL.B.  
 JERMAINE C. SPENCE, LL.B.  
 HYACINTH F. LIGHTBOURNE, BBA, J.D. (MIAMI)

GEORGETTE T. WILTSHIRE, B.A., LL.B.  
 PETER W. SIMMONDS, B.Sc., LL.B.  
 FRANCINE E. HOWELL-BRYCE, BBA., LL.B. (LIVERPOOL)  
 CANDICE T. STEWART, LL.B.  
 ROXANNE A. MILLER, LL.B. (LNU)  
 TERR-ANN A. LAWSON, B.A. LL.B.  
 MICHELLE J. PARKER, B.Sc., LL.B., MBA  
 COURTNEY M. WILLIAMS, B.A., LL.B.  
 TOPAZ L. M. JOHNSON, B.Sc., LL.B. (LON), M.Sc.  
 MARIA L. BURKE, B.A., LL.B., M.Sc  
 SHAUNNA-KAY E. CARTER, LL.B.

**CONSULTANTS**  
 C. D. R. BOVELL, C.D., M.A., LL.M. (CANTAB)  
 DENNIS G. EDMUNDS, B.A. (CANTAB)  
 WILLIAM D. PANTON  
 O. A. CAROL AINA, B.A. (SUSSEX)

P.O BOX 365  
 48 DUKE STREET  
 KINGSTON  
 JAMAICA, W.I.

TELEPHONE: (876) 922 - 1500  
 VOIP (U.S.A.): (678) 202 - 9818  
 TELEFAX: (876) 922 - 9002  
 (876) 924 - 9106

E-MAIL: info@dunncox.com  
 WEBSITE: www.dunncox.com

OUR REF. YOUR REF.  
 WRITER'S EXTENSION NUMBER

December 10, 2009

Chief Investigator  
 Office of the Contractor General  
 PIOJ Building  
 16 Oxford Road  
 P.O. Box 5

OFFICE OF THE CONTRACTOR-GENERAL  
 PIOJ BUILDING  
 16 OXFORD ROAD  
 P.O. Box 540  
 KINGSTON 5, JAMAICA, W.I.

Attention: Mr. Maurice Barrett

Dear Sirs,

Re: Conduct of the Office of the Contractor General

*MB/CS/HT (62)*

*[Signature]*  
11/12/09  
12:30 P

Reference is made to yours dated November 16, 2009 and November 19, 2009.

1. With regard to your threatening letter of November 19, 2009, DunnCox is not and will not be intimidated by any threats made by your office. We will continue to act in the interest of our clients in a professional manner and in accordance with the law as interpreted by the Courts. You leave us no alternative but to point out to you the relevant provisions of the law which you have clearly overlooked and/or ignored.

Legal Professional Privilege

2. In yours dated November 16, 2009, you have indicated that pursuant to various sections of the Contractor General Act (CGA), the OCG has the authority to override legal professional privilege between attorney and client. Your suggestion is inaccurate.

- 3. In support of your suggestion, you have cited Section 18(4) of the CGA. We note however that you failed to mention Section 18(5) of the CGA which states that "No person shall for the purpose of investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law." Legal professional privilege is one such circumstance. Section 18(4) of the CGA must therefore be read subject to Section 18(5) which is apt to cover legal professional privilege.
- 4. The House of Lords and Courts across the common lawworld recognize legal professional privilege as sacrosanct and a "fundamental human right established in the common law."<sup>1</sup> In the leading case of *R. v Derby Magistrates Court ex p B*<sup>2</sup>, Lord Taylor Gosforth CJ, upon a review of the authorities, concluded that:

"The principle which runs through all these cases... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

- 5. Furthermore, we refer you to an article in the West Indian Law Journal, Volume 34 dated May 29, 2009 No. 2 entitled "Legal Professional Privilege – Some Aspects of the Commonwealth Experience" by the (now) Honourable Mr. Justice C. Dennis Morrison J.A. which reads in part as follows at p.50:

"23. Although it is now generally accepted that the privilege is a fundamental right of the first importance, which the law should be careful to safeguard, it is nevertheless well established that "derogations appropriate to the needs of a democratic society may be contemplated".<sup>3</sup>

24. However, it is also clear that the privilege can only be abolished or curtailed by statute by clear and express language or necessary implication. As Lord Hoffman observed in *Morgan Grenfell*<sup>4</sup> "the courts will ordinarily construe general words in a statute, although literally capable of having startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so". To similar effect is the following statement by McHugh J. in his concurring judgement in *Daniels Corporation*:<sup>5</sup>

<sup>1</sup> *R. (on application of Morgan Grenfell & Co. Ltd v Special Commissioner of Income Tax)* [2002] 3 All ER 1, 4  
<sup>2</sup> 1995 4 All ER 526, 540-41  
<sup>3</sup> *Daniels Corporation*, supra, per Kirby J at paragraph 85  
<sup>4</sup> [2002] 3 All ER 1,5  
<sup>5</sup> [2002] HCA 49, paragraph 43

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“Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities the courts have recognized as fundamental unless the legislation does so in unambiguous terms. In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear. The courts will hold that the presumption has not been overcome unless the relevant legislation expressly abolishes, suspends or adversely affects the right, freedom or immunity or does so by necessary implication. They will hold that the legislature has done so by necessary implication whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation. A power conferred in ‘general terms, however is unlikely to contain the necessary implication because ‘general words will almost always be able to be given some operation, even if that operation is limited in scope”

25. In *Morgan Grenfell*, Lord Hobhouse was also careful to point out that a necessary implication is one which “necessarily follows: from the express provisions of the statute as construed in context. It is therefore to be distinguished from a reasonable implication, which may be a matter of interpretation, whereas “a necessary implication is a matter of express language and logic ...”<sup>6</sup>

We have enclosed a copy of the article for your ease of reference.

- 6. What is clear from the aforementioned passages is that the CGA must, upon its proper construction, clearly and unambiguously or by necessary implication, disclose an intention to override legal professional privilege if the CGA is to have that effect. Having regard to the clear language of 18(5), it is our view impossible to conclude that the necessary parliamentary intention to override legal professional privilege has unambiguously been disclosed.

Based on the foregoing, we would suggest that it is you who, as you say, have ‘not grasped the full import’ of the law and your legally conferred powers.

The Actions of the Contractor General

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
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<sup>6</sup> [2002] 3 All ER I, 13

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December 10, 2009

Attention: Mr. Maurice Barrett

Re: Conduct of the Office of the Contractor General

7. While we do not dispute the statutorily conferred authority of the OCG to investigate and/or monitor the award or termination of contracts, we do dispute the motives of the OCG's investigation of our retention for the following reasons:

a. In yours dated November 10, 2009, you stated as the basis upon which DunnCox's contract with Jamaica Vacations Limited (JAMVAC) was being investigated as follows:

"It is therefore incumbent on me to inform you that the OCG has decided to include, in the captioned Investigation [*that being the Enquiry into the American Air-Lines Guarantee Deal with for US\$4.5 Million.*] contractual matters pertaining to the retention of legal services by JAMVAC, insofar as they relate to the OCG's ongoing Investigation."

No other basis upon which the investigation was commenced has ever proffered.

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b. By way letter dated September 30, 2009 from the Ministry of Justice to the Honourable Dr. Lloyd Barnett O.J., Chairman of the Legal Council, Circular No. 35 from the Ministry of Finance and the Public Service dated September 22, 2008, and the Proclamations, Rules and Regulations dated December 12, 2008, it is clear that DunnCox's retention by JAMVAC for "legal services for non-routine assignments and litigation" are exempt from the public procedure handbook.

c. DunnCox, by way of its letter dated June 9, 2009, put you on notice that it acted for and on behalf of JAMVAC.

d. In yours of November 10, 2009, you stated that you were already in possession of our letter of engagement dated November 6, 2009 which defines the scope of DunnCox's retention as for services to assist JAMVAC with its compliance to the requests of the OCG. Thus, it is clear that DunnCox played no part in the American Air-Lines Guarantee Deal which was executed in August 2008.

e. Yet your investigation of our retention only commenced upon the heels of our Ms. Lightbourne characterizing the OCG's egregious actions of October 28, 2009, in a letter of the same date, as "inappropriate, unacceptable and skating ethical practice".

It is clear from the aforementioned that your decision to investigate our retention was done purely as an act of retribution rather than upon any sound concern that impropriety has occurred. Such conduct is an abuse of power.

December 10, 2009

Attention: Mr. Maurice Barrett

Re: Conduct of the Office of the Contractor General

55

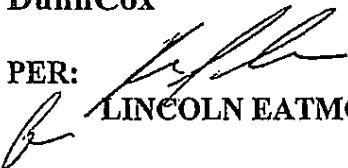
8. Further, while we acknowledge your discretion to inform relevant parties of your investigations, we must note that despite your many letters/requisitions to JAMVAC, it was only your letter of November 10, 2009 and subsequent letters addressed to our firm that have been copied to the various divisions of government. We can only surmise that your decision to copy the divisions was an attempt to embarrass or somehow malign our firms' good name. Such conduct is also an abuse of power.
9. To conclude, while zeal and exuberance in the execution of one's duty may be important qualities, they cannot under any circumstances be an excuse for an attempt to trample and destroy legal rights and our reputation.

It is with some regret that we have had to point this out to an office such as yours something which is so fundamental.

Yours faithfully,

**DunnCox**

PER:

  
**LINCOLN EATMON**

- cc: The Hon. Bruce Golding, M.P., Prime Minister of Jamaica
- cc: Ambassador Douglas Saunders, Cabinet Secretary
- cc: Dr. Wesley Hughes, C. D., Financial Secretary
- cc: Ms. Pamela Monroe-Ellis, Auditor General
- cc: Dr. Omar Davies, Chairman of the Public Accounts Committee of the Parliament of Jamaica
- cc: Dr. Wykeham McNeil, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica
- cc: Senator the Hon. Dorothy Lightbourne, Attorney General
- cc: The Hon. Edmund Bartlett, Minister of Tourism
- cc: Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism
- cc: Mr. John Lynch, Chairman, Jamaica Vacations Limited
- cc: Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited

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### ARTICLES

Third Annual Lloyd Barnett Lecture to The Council  
of Legal Education

*Adrian Saunders*

The Jamaican Charter of Rights and the Dynamics of Development

*Edward Seaga*

Substantive Legitimate Expectation –  
The Caribbean Perspective

*Albert K. Fiadjoe*

Legal Professional Privilege – Some Aspects of the  
Commonwealth Experience

*C. Dennis Morrison*

Lifetime Occupation Rights

*S. A. A. Cooper*

The Criminalization of Breaches of Corporate Duties –  
Policy Considerations and Caribbean Companies Legislation

*Audrey C. Welds*

Controlling Violent Crime: Strategy and Policy Options

*Anthony Harriott*

Knowing The Corners: The Relevance of The Common Law to The  
Caribbean Anticorruption Project

*Derrick V. McKoy*

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16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

LEGAL PROFESSIONAL PRIVILEGE --  
SOME ASPECTS OF THE COMMONWEALTH EXPERIENCE

C. Dennis Morrison\*

**Introduction**

1. In the case of *The Jamaican Bar Association and others v. The Attorney General and the Director of Public Prosecutions of Jamaica*,<sup>1</sup> the Court of Appeal of Jamaica held that legal professional privilege had been breached by the search of several lawyers' offices and seizure of various clients' files, without any lawful authority.

2. The searches of the lawyers' offices were carried out under the purported authority of warrants issued pursuant to the Mutual Assistance (Criminal Matters) Act, a statute enacted by the Jamaican Parliament in fulfillment of treaty obligations with the Government of Canada (and other Commonwealth countries) for the purpose of providing mutual assistance in criminal matters.

3. There was, as Panton JA (as he then was) pointed out in his judgment, "no allegation that any of the attorneys or their members of staff had committed any criminal offences, or that there had been any wrongdoing by anyone on those premises". The objective of the searches was the obtaining of information relating to a Canadian citizen resident in Jamaica, in respect of whom extradition proceedings at the instance of the Canadian Government were at the time pending before the Jamaican courts.

4. The circumstances, as Panton JA described them, were "unprecedented in the history of our country", and gave rise to litigation against the state, joined by the Jamaican Bar Association on behalf of the legal

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1 The Honourable Mr. Justice C. Dennis Morrison is a Judge of the Court of Appeal in Jamaica and in Belize.

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1st FLOOR, P.O.J. BUILDING  
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P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

profession, challenging the constitutionality of the searches and the legality of the authority under which they had purportedly been carried out.

5. The Court of Appeal, although holding that the Act itself was not unconstitutional, nevertheless concluded that the warrants purportedly issued under the Act were unlawful, that the searches and seizures effected thereunder were accordingly unconstitutional and were, in any event, in breach of the principle of legal professional privilege. Panton JA (with whose judgment Forte P and McCalla JA, as she then was, agreed), after a careful review of a number of Commonwealth authorities, concluded on this aspect of the matter as follows:<sup>2</sup>

"In the circumstances that gave rise to these appeals, legal professional privilege was breached as there was no lawful authority for the searches and seizures. The situation would have been different if there was an allegation of criminal conduct on the premises, or by the attorneys or their clients in the attorney/client relationship, seeing that legal professional privilege cannot be used to mask or permit criminal conduct. There was no such allegation in the situations that have been presented to the Court. Attorneys have a duty to the Court, and to maintain the standards that are set out in the Gazetted code of ethics. If those standards are breached, there is a well established mechanism to deal with such attorneys. So far, it cannot be said that the mechanism has not been working. The Act provides for a method of securing the production of documents. That is the method that is to be used, particularly in situations where no criminal conduct is alleged. If there are situations that are not covered by the Act, then it is incumbent on state officials such as the Attorney General and the Director of Public Prosecutions to have discussions with the Bar in order to arrive at an agreement as to the procedure to be followed - as has happened in other Commonwealth jurisdictions."

6. The purpose of this paper is to examine some of the relevant Commonwealth authorities and to locate the decision of the Court of Appeal of Jamaica within the wider context that they provide.

### The basic principle

7. It is now usual to divide legal professional privilege into two branches, described respectively as legal advice privilege and litigation

privilege. Legal advice privilege arises out of the relationship of confidence between lawyer and client and is by its very nature absolute. Where it applies, it gives to the client the right to decline to disclose or to allow disclosure of the confidential communication or document in question, though the privilege may be waived by the client or overridden by statute in clear and express terms (see generally *Three Rivers District Council v Bank of England* (No. 5)).<sup>3</sup> Litigation privilege extends to communications between lawyers and their clients and third parties (such as doctors, surveyors, engineers, valuers and the like), where such communications are made for the dominant purpose of obtaining legal advice in connection with pending or contemplated litigation.<sup>4</sup>

8. A good modern statement of the rationale of legal professional privilege is to be found in the opinion of the Advocate General (Sir Gordon Slynn) in *MM & S Europe Ltd v Commission of the European Communities*,<sup>5</sup> as follows:

"Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and, if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks."

9. The rule, traditionally regarded as a rule of evidence, has now come to be restated in what Cross and Tapper on Evidence have described as "something more nearly resembling a basic constitutional principle, expressed in the rhetoric of rights".<sup>6</sup> So, for instance, in the leading English case of *R. v Derby Magistrates' Court, ex p B*,<sup>7</sup> Lord Taylor of Gosforth CJ concluded his review of the authorities in these terms:

"The principle which runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he

<sup>2</sup> [2005] 4 All ER 948.

<sup>3</sup> *Phelan v. Le Marchant* (1881) 17 Ch D 675. *Hughes v. British Railways Board* [1979] 2 All ER 1169.

<sup>4</sup> [1983] 1 All ER 705, 732-733, also recently cited with approval by Lord Carswell in *Three Rivers v. Bank of England*, *supra*, at page 983.

<sup>5</sup> 11<sup>th</sup> edition, 2007, page 468.

<sup>6</sup> [1995] 4 All ER 526, 540-41.



might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

10. And in *R. (on the application of Morgan Grenfell & Co. Ltd.) v. Special Commissioner of Income Tax*,<sup>8</sup> Lord Hoffman described it as "a fundamental human right long established in the common law", pointing out that an intention on the part of the legislature "to override such rights must be expressly stated or appear by necessary implication".<sup>9</sup>

11. Despite still occasional doubts at a high level as to the scope of the doctrine,<sup>10</sup> particularly in the light of the fact that the privilege, where it applies, uniquely restricts the power of a court to compel production of what would otherwise be relevant evidence (contrary to modern civil procedural orthodoxy), it is now, as Baroness Hale of Richmond observed in *Three Rivers v. Bank of England*, "too well established in the common law for its existence to be doubted now."<sup>11</sup> Indeed, in that case the House of Lords confirmed the existence of the rule in all its traditional rigour; Baroness Hale in a brief concurrence commenting as follows:

"And there is a clear policy justification for singling out communications between lawyers and their clients from other professional communications. The privilege belongs to the client, but it attaches both to what the client tells his lawyer and to what the lawyer advises his client to do. It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct. The client may not always act upon that advice (which will sometimes place the lawyer in professional difficulty, but that is a separate matter) but there is always a chance that he will. And there is little or no chance of the client taking the right or sensible course if the lawyer's advice is inaccurate or unsound because the lawyer has been given an incomplete or inaccurate picture of the client's position."

<sup>8</sup> [2002] 3 All ER 1, 4.

<sup>9</sup> *Ibid.* at page 5.

<sup>10</sup> As for instance in the Court of Appeal in *Three Rivers v. Bank of England* [2004] 3 All ER 168.

<sup>11</sup> [2005] 4 All ER 948, 970.

12. Beyond the United Kingdom the rule has been similarly stated in other jurisdictions, notably Canada, Australia and New Zealand. In *Solasy v. The Queen*,<sup>12</sup> the right to communicate in confidence with one's legal adviser was characterized by Dickson J in the Supreme Court of Canada as "a fundamental civil and legal right, founded upon the unique relationship of solicitor and client." In *Descoteaux v. Mierzewski*,<sup>13</sup> Lamer J adopted this description of the rule, adding that: "(g) is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others [and] gives rise to preventive or curative remedies provided for by the law, depending on the nature of the aggression threatening it or of which it was the object".

13. In Australia, legal professional privilege is regarded as "not merely a rule of substantive law ... [it] is an important common law right or, perhaps, more accurately, an important common law immunity,"<sup>14</sup> as also "an important human right deserving of special protection for that reason."<sup>15</sup>

#### Competing public interests - a balancing exercise?

14. In *Southwark and Kentish Water Co. v. Quirk*,<sup>16</sup> Cockburn CJ, after restating the rule of privilege in traditional terms, observed as follows:

"Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the occasional risk."

15. Nevertheless, there have from time to time been occasional departures from strict adherence to the rule on the ground of a perceived need to strike a balance between competing public interest considerations of one kind or another.<sup>17</sup> *R. v. Derby Magistrates' Court* is a case in which, as Lord Millet was to observe subsequently,<sup>18</sup> "the

<sup>12</sup> (1979) 105 DLR (3d) 745, 760.

<sup>13</sup> (1982) 141 DLR (3rd) 590, 601.

<sup>14</sup> See the judgment delivered by the majority of the High Court of Australia in *The Daniels Corporation International Pty Ltd. v. Australian Competition and Consumer Commission* [2002] HCA 49, paragraph 11, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

<sup>15</sup> *Ibid.* per Kirby J at paragraph 86.

<sup>16</sup> (1878) 3 QBD 315, 317 - 18.

<sup>17</sup> See, for instance, *R. v. Barton* [1997] 3 All ER 1192 and *R. v. Atton* [1988] 2 All ER 321.

<sup>18</sup> In *R. v. Aitchison District Law Society* [2004] 4 All ER 369, 381.

public interest in overriding the privilege could scarcely have been higher." In that case the applicant was charged with the murder of a young girl. He initially made a confession to the police, but afterwards changed his story and said that his stepfather had killed the girl. He was in due course tried and acquitted, whereupon the stepfather was then charged with the murder. At his committal for trial, the applicant was called as a prosecution witness, and in cross-examination was asked by the defence about the instructions he had given his solicitors in relation to his original account of what had taken place. He declined to waive privilege. The stepfather then obtained from the stipendiary magistrate the issue of a witness summons requiring the applicant's solicitor to produce materials disclosing the applicant's factual instructions in defence to the charge of murder, but not the advice given to him by his solicitors and counsel.

16. On the applicant's application for judicial review, the Divisional Court upheld the magistrate's decision that the question was whether the applicant's interest in asserting the privilege outweighed the public interest in avoiding a miscarriage of justice by ensuring that relevant and admissible evidence should be made available to the defence in criminal proceedings. This question, it was held, could admit of only one answer since, given that the applicant had been acquitted and could not be tried again, disclosure was not likely to cause him significant harm, while, on the other hand, non-disclosure would put an innocent man at risk of a conviction for murder.

17. On appeal, the House of Lords upheld the applicant's claim to privilege and expressly rejected the argument that legal professional privilege is an interest which falls to be balanced against competing public interests. Lord Taylor of Gosforth CJ observed that

"...if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has been applied across the board in every case, irrespective of the client's individual merits."<sup>19</sup>

18. Authority to the same effect is to be found in New Zealand where, in *R. v Ujje*,<sup>20</sup> McMullin J stated that —

"It is not now a question of weighing the public interest in each case to see whether the rule... should be applied. Whether the principle operates as a bar to the emergence of the truth and to the overall public detriment is not now a relevant legal consideration".

19. And in Australia in *Carier v Northmore Hale Dary & Leake*<sup>21</sup> it was held that a person who has in his possession or power documents which are subject to legal professional privilege which is not waived cannot be compelled to produce them on subpoena issued on behalf of an accused person in criminal proceedings, even though those documents might establish the innocence of the accused or may materially affect his defence.

20. In *B v Auckland District Law Society*,<sup>22</sup> the Privy Council (on appeal from New Zealand), after a full review of these authorities, agreed that "the rationale of the doctrine compels this conclusion," though it was expressly recognized that a different approach had been adopted in Canada, "where the courts do conduct a balancing exercise by reference to the facts of a particular case".<sup>23</sup>

21. As Arbour J points out in *Lavallee, Rakel and Heintz v Canada*<sup>24</sup>: section 8 of the Canadian Charter of Rights and Freedoms<sup>25</sup> "only protects against unreasonable searches and seizures"<sup>26</sup> and that the Supreme Court has as a consequence "striven to strike an appropriate balance between privacy interests on the one hand and the exigencies of law enforcement on the other".<sup>27</sup> However, the learned judge (speaking for the majority of the nine member court) went on to say the following:<sup>28</sup>

"Where the interest at stake is solicitor-client privilege — a principle of fundamental justice and civil right of supreme importance in Canadian law — the usual balancing exercise referred to above is not particularly helpful. This is so because the privilege favours not

<sup>21</sup> (1995) 183 CLR 121.

<sup>22</sup> [2004] 4 All ER 269, 283.

<sup>23</sup> *Ibid.* As Lord Millett observed, "The common law is no longer monolithic".

<sup>24</sup> [2002] 216 DLR (4<sup>th</sup>) 257.

<sup>25</sup> "Everyone has the right to be secure against unreasonable search and seizure."  
<sup>26</sup> (2002) 216 DLR (4<sup>th</sup>) 257, 283.

<sup>27</sup> *Ibid.* at page 284.

<sup>28</sup> *Ibid.*

<sup>19</sup> [1995] 4 All ER 526, 540 — 41.

<sup>20</sup> [1982] 1 NZLR 361, 376.

only the privacy interest of a potential accused, but also the interest of a fair, just and efficient law enforcement process. In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it...

Indeed, solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection. Such protection is ensured by labeling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary. In short, in the specific context of law office searches for documents that are potentially protected by solicitor-client privilege, the procedure set out in s.488.1 will pass charter scrutiny if it results in a "minimal impairment" of solicitor-client privilege."

22. "Minimal impairment" has thus long been the standard by which the Supreme Court of Canada has measured the reasonableness of state encroachments on solicitor-client privilege and, even in cases in which it has been held that such impairment is justified in the particular circumstances, it has been held that the disclosure of the privileged material "should generally be limited as much as possible."<sup>29</sup>

#### The abrogation of legal professional privilege – the need for clarity

23. Although it is now generally accepted that the privilege is a fundamental right of the first importance, which the law should be careful to safeguard, it is nevertheless well established that "derogations appropriate to the needs of a democratic society may be contemplated"<sup>30</sup>

24. However, it is also clear that the privilege can only be abolished or curtailed by statute by clear and express language or necessary implication. As Lord Hoffman observed in *Morgan Grenfell*<sup>31</sup> "the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence such as overriding fundamental human rights, as not having been intended to do so". To similar effect is the following statement by McHugh J in his concurring judgment in *Daniels Corporation*:<sup>32</sup>

<sup>29</sup> *Smith v Jones* (1999) 169 DLR (4<sup>th</sup>) 385, paragraph 86.

<sup>30</sup> *Daniels Corporation*, supra, per Kirby J at paragraph 85.

<sup>31</sup> [2002] 3 All ER 1, 5.

<sup>32</sup> [2002] HCA 49, paragraph 43.

"Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognized as fundamental unless the legislation does so in unambiguous terms. In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear. The courts will hold that the presumption has not been overcome unless the relevant legislation expressly abolishes, suspends or adversely affects the right, freedom or immunity or does so by necessary implication. They will hold that the legislature has done so by necessary implication whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation. A power conferred in general terms, however, is unlikely to contain the necessary implication because 'general words will almost always be able to be given some operation, even if that operation is limited in scope'."

25. In *Morgan Grenfell*, Lord Hobhouse was also careful to point out that a necessary implication is one which "necessarily follows" from the express provisions of the statute as construed in context. It is therefore to be distinguished from a reasonable implication, which may be a matter of interpretation, whereas "a necessary implication is a matter of express language and logic..."<sup>33</sup>

26. In Commonwealth Caribbean countries, where there are constitutionally guaranteed fair hearing requirements (see, for instance the Jamaican Constitution, section 20(1) and (2)), special care will also be needed to ensure that any proposed legislation in this area does not breach those provisions.

#### Law office searches – a special challenge

27. Searches of lawyers' offices, with which the *Jamaican Bar Association* case referred to at the outset of this paper was concerned, have posed special challenges, in particular in the context of legislation which, when properly construed, may appear to sanction such searches specifically. In *Descoteaux v Mierzwiński*<sup>34</sup> the Supreme Court of Canada considered the ambit and applicability of the provisions of the Canadian Criminal Code which enabled a justice of the peace to issue

<sup>33</sup> [2002] 3 All ER 1, 13.

<sup>34</sup> (1982) 141 DLR (3d) 590.

search warrants to enter premises and to seize articles on reasonable grounds of belief that such articles were "intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant" (section 443 (1) (b)). This is how Lamer J formulated the applicable rule.<sup>35</sup>

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under para. 2 and enabling legislation referred to in para. 3 must be interpreted restrictively."

28. This was a case in which the court considered that the terms of the legislation were sufficiently expansive to sanction a search of a lawyer's office, thus making it necessary to reconcile the authority to search with the right of confidentiality. The striking of the right balance in this regard was held to require a justice of the peace to be more demanding before authorizing a search of a lawyer's offices or one of his files, taking into account "the need to protect the fundamental right of a lawyer-client to have his communications kept confidential".<sup>36</sup>

29. Ways of achieving this balance might include the justice of the peace insisting on the search being made in the presence of a

representative of the lawyer's professional association and himself scrutinizing the documents in question carefully and securing from general examination (at any rate, without the order of a competent court) those parts that are obviously confidential.

30. Lamer J ended his judgment by acknowledging the call of some for legislative guidelines and, in their absence, the formulation by consultation and agreement of a uniform practice, whether by rules of court or informally, for dealing with the matter.<sup>37</sup>

31. Following on from this decision, the Canadian Parliament introduced legislation in 1985 to provide for a mandatory procedure to be followed in relation to the search and seizure of documents in the possession of a lawyer. Section 488.1(2) of the Criminal Code<sup>38</sup> provided that "where a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege" is about to be seized, the document shall be seized and sealed. If the lawyer was not present or made no claim of privilege, the peace officer was required to seize the document and was free to examine it and deal with it according to law. If the document was sealed, then section 488.1(3) provided that the Crown, the lawyer or the client might apply to the court within 14 days for a determination of the privilege and it was further provided that, on the adjudication of the privilege claims, the judge could inspect the document and allow the Attorney General to do so as well. If the judge determined that the claim to privilege was well founded, the document remained privileged and would have to be returned. If no application was made to assert the privilege or if it was not made within the time limited for the purpose, the judge would order that the document be delivered back to the peace officer.

32. After some 17 years of operation, the Supreme Court in *Lavallee, Taddei & Heintz v Canada (A.G.)*, in a six to three majority decision, struck down the section 488.1 procedure on the ground that it provided the privilege holder with inadequate legal protection. The majority affirmed that solicitor-client privilege was a principle of fundamental justice in Canadian law and ought accordingly to remain as close to absolute as possible. In the view of the majority, section 488.1 more than

35 *Ibid.* at page 605.

36 *Ibid.* at page 614.

37 *Ibid.* at page 618.

38 S.C. 1985, c. C-46.

39 (1982) 216 SCR (4th) 257.

minimally impaired the privilege in a number of important aspects<sup>40</sup> and was therefore held to be in breach of the Charter protection from unreasonable search and seizure.

33. The court was particularly concerned that the procedure permitted the client's privilege to be lost through the absence or inaction of his lawyer, that in claiming the privilege the lawyer was required to name the client, that there was no requirement of notice to a client whose documents were about to be turned over to investigators, that the insistence on strict time limits within which to claim privilege created an unreasonable procedural rigidity, that there was no remedial discretion to relieve the privilege holder from the consequences of default, and that the Attorney General was in certain circumstances allowed access to the documents in question prior to a judicial determination as to the existence of the privilege. In the result, the offending section was struck down under the provisions of the Constitution Act, 1982, which specifies that any law which is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect. Far from upholding solicitor-client confidentiality, Arbour J concluded, "s.488.1 permits the privilege to fall through the interstices of its inadequate procedure."<sup>41</sup>

34. Although the court in *Lavallee* considered that the remedy to the problem would be best left to Parliament, it nevertheless laid down some "general principles that govern the legality of searches of law offices as a matter of common law" in the interim, as follows:<sup>42</sup>

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

40 Set out in the judgment of Arbour J, who wrote for the majority, at pages 279 - 282.

41 *Ibid.* at page 289.

42 *Ibid.* pages 292 - 293.

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. The investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

35. The court's judgment can therefore be seen as a strong endorsement of the near sanctity of the principle and a re-affirmation of its continued vitality in the modern era. More recently, in the South African case of *Hint (Pty) Ltd, Jacob Zuma and Michael Hulley v National Director of Public Prosecutions, et al.*<sup>42A</sup> in a judgment delivered on 31 July 2008, the Constitutional Court of South Africa referred with approval to *Lavallee*. However, on the facts of that case it was held by the majority that the issuing of a warrant to search and seize documents at the office of Mr Zuma's lawyer was largely in keeping with the relevant enabling legislation and involved no breach of the privilege.

42A [2008] ZACC 13.



### The role of guidelines

36. One of the submissions made on behalf of the state in the *Jamaican Bar Association* case was that "provisions for the issue of a search warrant which would extend to lawyers' offices are clearly reasonably required for the investigation and detection of crime."<sup>43</sup> Were it otherwise, the Solicitor-General contended, lawyers' offices would become "safe havens" beyond the reach of the law.

37. Although that submission was not accepted by the court in that case, there can be no doubt that it may surface again, albeit in altered form. The worldwide fight against the growth of organized crime has given rise to what Arbour J in *Lavallee* described as "more aggressive investigatory methods which include the issuing of warrant to search law offices for evidence of crime."<sup>44</sup> In this regard, it is obvious that the well established principle of some antiquity that exempts from privilege communications between lawyer and client with a view to facilitating the commission of a crime or the perpetration of a fraud,<sup>45</sup> may not be perceived by law enforcement authorities as providing a sufficiently wide exception for the purposes of criminal investigation. The challenge nevertheless is, as Ngcobo J put it in his minority judgment in *Thint (Pty) Ltd et al v National Director of Public Prosecutions et al*,<sup>45A</sup> "to strike a very delicate balance between, on the one hand, the need to fight crime and on the other hand, the need to protect individuals against unwarranted invasions of their privacy and dignity".

38. In the *Jamaican Bar Association* case, Panton JA made express reference to the possibility of consultation and cooperation between the authorities and members of the practising profession with a view to developing appropriate guidelines to regulate law office searches if ever these are found to be necessary as part of the process of criminal investigation. In time, if, as one hopes it will be, it is decided to explore this possibility, the principles enunciated in *Lavallee* may provide a helpful starting point, as will the Australian experience, where general guidelines were agreed between the Australian Federal Police and the

Law Council of Australia in 1997, for the purpose of negating or reducing "the risks of documents which may be subject of legal professional privilege being seized pursuant to ... search warrants".<sup>46</sup>

### Conclusion

39. As this brief and somewhat selective survey has hopefully demonstrated, there has been a renewed coalescence of doctrine around the Commonwealth on the subject of legal professional privilege. The doctrine remains of central importance today, no less so than it did in an earlier age. Wilson J's formulation in the leading Australian case of *Baker v Campbell*<sup>47</sup> is accordingly as relevant today as it was 25 years ago:

"The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection."

<sup>43</sup> *Jamaican Bar Association v Attorney General and Director of Public Prosecutions*, supra, at page 41 of Panton JA's judgment

<sup>44</sup> (2002) 216 DLR (4th) 257, 271.

<sup>45</sup> *R v Cox and Railton* (1884) 14 QBD 153.

<sup>45A</sup> [2008] ZACC 13, paragraph 231.

<sup>46</sup> "General Guidelines between the Australian Federal Police and the Law Council of Australia as to the execution of search warrants on lawyers' premises, law societies and like institutions in circumstances where a claim of Legal Professional Privilege is made", 3 March 1997. See also section 29 of the South African National Prosecuting Authority Act.

<sup>47</sup> (1983) 153 CLR 52, 95.



COPY

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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ Building  
16 Oxford Road  
P.O. Box 540  
KINGSTON 5  
JAMAICA, W.I.

No. :

TELEPHONE No.:876-929-8560/6466  
FAX No. : 876-929-2476  
E-mail: mbarrett@ocg.gov.jm

VERY URGENT

2009 December 14

DunnCox  
Attorneys-At-Law  
P.O. Box 365  
48 Duke Street  
Kingston  
Jamaica, W.I.

Attention: Mr. Lincoln Eatmon, Esq., Senior Partner

Dear Sirs:

Re: Request for Apology and Withdrawal of Defamatory Statements Made Against the Contractor General and the Office of the Contractor General – In the Matter of the Retention of Legal Services by Jamaica Vacations Limited (JAMVAC) to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act

We write to acknowledge our receipt of your letter dated 2009 December 10, which was received in the Office of the Contractor General (OCG) on Friday, 2009 December 11. We also write further to and in confirmation of a teleconference which was conducted between our respective offices (Greg Christie/Chris Bovell/Maurice Barrett) shortly after the OCG's receipt of the referenced correspondence on Friday afternoon at 3:00 PM.

Your missive of the 10<sup>th</sup> instant contains certain expressed opinions and unequivocal statements which warrant the OCG's reiteration of its previously articulated positions as well as the conveyance of certain material facts to your knowledge. Facts, which, based upon the content of your letter, it is apparent that you were not fully apprised of at the time of your drafting of the referenced letter.

The elucidation of the referenced documented facts will, beyond doubt, render your bold and unequivocally expressed statements which have attributed to the OCG an act of 'retribution', an attempt to malign the good name of DunnCox and the consequent alleged "abuse of power" by the Contractor General and the OCG, to be baseless and, indeed, bordering upon recklessness and lending itself to being libelous.

We will, therefore, address the content of your letter based upon the three (3) main issues which it seeks to convey, inclusive of your assertion that the OCG has overlooked and/or ignored certain aspects of the law. As such, detailed hereunder are our responses thereto:



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### Legal Professional Privilege

We must thank you for the extensive research which you have undertaken regarding the application of Section 18 of the Contractor General Act to the legal professional privilege which exists between Attorneys-at-Law and their Clients.

Section 18 of the Contractor General Act is, in fact, a very unique provision of the statute, which, quite understandably, brings about an appreciable apprehensiveness regarding its applicability. We must, however, respectfully advise that we do not share the opinion which has been proffered by your goodly offices.

In the instant matter, and using the very cases and legal arguments which have been advanced by you, we must highlight the following which, in the OCG's view, fully supports the OCG's positions:

- a. Legal professional privilege is deemed sacrosanct. However, *"the privilege can be abolished or curtailed by statute by clear and express language or necessary implication"*. For the avoidance of doubt, we have stated hereunder the provisions which are contained in Section 18(4) of the Contractor General Act as follows:

*"Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person under the Official Secrets Act, 1911 to 1939 of the UK (or of any Act of Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor General for the purpose of an investigation ..."*

- b. The courts will curtail or abolish the privilege *"whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation"*.

A careful reading of the Contractor General Act, and in particular Section 18 of the Act, will reveal that there is no ambiguity in Section 18(4) of the Contractor General Act. Further, it is the OCG's considered view that Sections 18(1), 18(2), 18(4) and 18(5) of the Contractor General Act, both in terms of the language employed and their expressed intent, do not support the argument which is being posited by you, particularly having regard to the peculiar public interest circumstances which lie at the very foundation of this matter.

Further, in the instant matter, the OCG's Requisition to DunnCox, which was dated 2009 November 10, required you solely to provide an itemized and disaggregated listing and details of the charges which had been billed and/or which were billable to and payable by Jamaica Vacations Limited (JAMVAC) in respect of legal services which were rendered by DunnCox in respect of matters which related specifically to the Government contract which was consummated between JAMVAC and DunnCox. In particular, the matters were related to the expenditure of public funds by your Clients, who, in respect of all of the material issues which are under consideration, were public servants acting at all material times in the discharge of their public functions.





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Further, and despite the fact that it is the OCG's contention that Section 18 of the Contractor General Act overrides the Attorney/Client privilege which is the subject of this matter, it must nevertheless be further emphasized that the OCG's Requisition of DunnCox did not in any way require DunnCox to divulge the nature and/or content of the Attorney/Client disclosures which had taken place between DunnCox and Mr. John Lynch and/or Mr. Lionel Reid nor the particulars of any professional advice which was given by DunnCox to Mr. John Lynch and/or Mr. Lionel Reid.

#### The Actions of the Contractor General

Page four (4) of your letter states that whilst you do not question the OCG's statutory authority to monitor the award and/or termination of Government contracts, you have nonetheless deemed it necessary to dispute the motives of the OCG's Investigation of the procurement, by JAMVAC, of legal services from DunnCox or, for that matter, from any other attorney, in this matter.

In pursuit of your argument, you have advanced five (5) justifications. Based thereupon, you have concluded that the OCG's decision *"to investigate (DunnCox's) retention was done purely as an act of retribution rather than upon any sound concern that impropriety has occurred. Such conduct is an abuse of power."*

The reasons which have been put forward by you include:

- (1) The basis of the OCG's Investigation, as was stated in the OCG's letter to you of 2009 November 10;
- (2) The fact that "legal services for non-routine assignments and litigations are exempt from the public procedure handbook."
- (3) DunnCox advising the OCG, by way of letter dated 2009 June 9, that it acted for and on behalf of JAMVAC;
- (4) The fact that the OCG was already in possession of DunnCox's letter of engagement. Further, that DunnCox played no part in the American Airlines Guarantee Deal which was executed in 2008 August; and
- (5) That the OCG's Investigation of DunnCox's retention only commenced upon the heels of your Ms. Cindy Lightbourne's characterizing the OCG's actions of 2009 October 28, in a letter of the same date, as "inappropriate, unacceptable and skating ethical practice."

First, we must inform you that in its conduct of any Investigation under the Contractor General Act, the OCG is not compelled to provide you or any person with full or any particulars of its reasons for launching its Investigation. As rightly stated, the OCG has offered DunnCox no other reason other than that which was documented in the OCG's letter of 2009 November 10.

Second, non-routine legal services are in point of fact exempt from the procurement guidelines. However, they are by no means removed from the purview of the expressed oversight statutory monitoring and investigative jurisdiction of a Contractor General under Sections 2, 4, 15, 16, 17 and 18 of the Contractor General Act. This is a fact which, it appears, you are prepared to continue to overlook.

In the circumstances, we should place upon the record the fact that by way of letter, dated 2009 November 5, addressed to the Financial Secretary and the Learned Attorney General, and copied to the Chairman of the General Legal Council (GLC), the Government of Jamaica and the GLC were formally advised of the OCG's positions as above.



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You should be further aware that, by way of letter, dated 2009 November 12, which was received by the OCG on 2009 December 2, the Chairman of the GLC wrote to the OCG advising it, *inter alia*, in the following terms: "***The General Legal Council fully supports the principle that all government contracts be awarded impartially and on merit. It is clearly the responsibility of all Public Bodies to ensure that the awards are properly made and as it is for all clients (of attorneys) to ensure that the fees charged are fair and reasonable***".

Thirdly, the OCG has been aware, and was so advised, that DunnCox was acting for JAMVAC since 2009 June 9 – a fact which it does not dispute. Further, the OCG acknowledges that DunnCox was not involved in the American Airlines Guarantee Deal – another statement of fact.

Lastly, and quite importantly, your concluding reason states that the OCG's Investigation commenced post 2009 October 28 – another statement of fact. However, DunnCox, in imputing motive, has erred by ascribing an act of "*retribution*" and "*an abuse of power*" to the instigation of the OCG's Investigation. These reasons, quite unfortunately, are grounded in DunnCox's ignorance of the facts which led to the OCG's inclusion, in its Investigation, of the matter regarding JAMVAC's retention of DunnCox for the provision of legal services.

**The OCG's Investigation of the American Airlines Guarantee Deal, and the retention by JAMVAC of the legal services of DunnCox, are two separate issues which have become inextricably intertwined and, which, for the record, have been the documented subject of the OCG's formal monitoring jurisdiction and attention, under the Contractor General Act, since 2009 June 10 – and not since 2009 November 10 as your letter has erroneously asserted.**

With the aforementioned stated, we must now respectfully advise you of the following pieces of documented correspondence which will unequivocally contradict your unfortunate and unfounded assertions that the OCG's Investigation in the matter regarding JAMVAC's retention of your services (a) was actuated by malice on the part of the OCG against DunnCox, (b) is an act of "*retribution*" against DunnCox and, (c) consequently constitutes "*an abuse of power*" on the part of the Contractor General and the OCG.

- (1) Letter from the OCG to Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism, dated 2009 June 10, advising her of the OCG's intent, *inter alia*, to monitor the contract between DunnCox and JAMVAC and questioning the propriety of the actions of representatives of JAMVAC and the Tourism Enhancement Fund (TEF) in securing the services of a private law firm;
- (2) Letter, dated 2009 June 18, from Mrs. Jennifer Griffith to the OCG, in response to the OCG's letter of 2009 June 10;
- (3) Letter, dated 2009 June 30, from the OCG to Mrs. Jennifer Griffith requesting further information on the retention of the referenced legal services;
- (4) Letter, dated 2009 July 16, from Mrs. Jennifer Griffith to the OCG in response to the OCG's letter of 2009 June 30;
- (5) Letter, dated 2009 November 3, from the OCG to Mrs. Jennifer Griffith advising her of the OCG's intention to now formally include the retention of the legal services rendered by DunnCox as a component of its ongoing Investigation into the American Airlines Guarantee Deal;
- (6) Letter, dated 2009 November 6, from Mrs. Jennifer Griffith, written in response to the OCG's letter of 2009 November 3.



In 2009 June, the OCG, upon realizing that legal services were purportedly 'procured' on behalf of certain representatives of JAMVAC and the Tourism Enhancement Fund (TEF), questioned *inter alia*, (1) the appropriateness of same; (2) the approvals which were involved in the retention of such legal services; and (3) the associated costs of the services which were to be provided by DunnCox. You will no doubt now accept, particularly in light of the expressed terms of the GLC's letter to the OCG of 2009 November 12, that these are matters which the OCG is lawfully entitled to pursue and that, consequently, the pursuit of same cannot be regarded to be an "abuse of power" as you have asserted.

In its correspondence of 2009 June 10 and 2009 June 30, the OCG placed upon the record its consternation regarding the retention of the legal services and "*the propriety of Government accountable/accounting officers/officials and other public servants, who are requisitioned in the said capacities, to seek such legal recourse at the expense of the Jamaican Taxpayers.*"

Without prejudice to the aforementioned, and in exercising fairness to public officials/officers, the OCG also articulated that it is mindful that "... *every individual has a right to obtain legal representation in any matter, if so desired...*" However, the fundamental issue that was of concern to the OCG then, and even more so today, as was aptly captured in our missive of 2009 June 10, is:

*"... not one of the public servant's right to obtaining legal representation, but rather the propriety of doing so in a matter which requires the simple disclosure of information regarding the discharge of their daily functions and responsibilities in their capacities as public servants, for matters which are related to the public body/bodies for which they are accountable.*

*The actions which have been taken by representatives of JAMVAC and TEF, and which are explicitly conveyed by the correspondence from DunnCox, begs the question as to whether or not public officials, who are accountable, both in law and administratively, for public bodies and/or agencies, can properly retain such services in the pursuit of responding to questions which are within the remit of their lawful public offices and responsibilities."*

Further, in its letter of 2009 November 3, to the Permanent Secretary, the OCG stated, *inter alia*, that "In the conduct of its Investigations, the OCG has received from Messrs. John Lynch and Lionel Reid, responses to its statutory requisition, through the offices of DunnCox. However, in more than one instance, the representations which have been made to the OCG, through DunnCox, has begged the question of the need for an Attorney-at-Law and whether the expense which has been placed upon the Taxpayers of Jamaica can in any way be justified".

Therefore, it is factually incorrect to suggest, much less to expressly state and publish, that the OCG's reasons for investigating the contract with DunnCox was in any way vindictive or motivated by ill-intent, ill-will, malice or retribution.

Further, you have also stated that it was only the OCG's letter of 2009 November 10 which was copied to various divisions of Government with the intention of embarrassing DunnCox and/or to malign the firm's good name and reputation. This very regrettable but manifestly false and unfounded assertion which imputes further malice and motive against DunnCox on the part of the Contractor General and the OCG, has been used, yet again, as the basis upon which you have boldly but erroneously accused the Contractor General and the OCG of an "abuse of power".

For the record, we must respectfully advise you that all six (6) pieces of correspondence which are referred to



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above, were copied to various authorities of the Government. In fact, from as early as 2009 June 10, all six (6) pieces of correspondence were copied, at all material times, to all of the State authorities and persons that are listed in the OCG's letter of 2009 November 10, save and except for the Hon. Bruce Golding, the Prime Minister of Jamaica. The letters which are listed at items #5 and #6 were copied to the Prime Minister.

It is also important to note that, included in the list of the Government authorities and persons who were copied on the OCG's correspondence of 2009 June 10, and all subsequent correspondence as are listed above, were your two (2) Clients, Public Officers Mr. John Lynch and Mr. Lionel Reid.

The documented fact circumstances, therefore, do not in any way, shape or form, support your arguments of vindictiveness, malice or retribution on the part of the Contractor General or the OCG, nor do they support your contention of an abuse of power by the Contractor General.

In the circumstances, and having regard to the grave and injurious nature of the unfortunate comments which have been made by you against the Contractor General and his office, and the manner in which you have falsely asserted that he has discharged his statutory functions – none of which is in any way supported by the facts, we must respectfully advise that the OCG requires both an apology and a withdrawal of the referenced allegations and that same be done in writing no later than 2009 December 21. Your letter should be copied to all persons and authorities to whom your letter of 2009 December 10 was copied.

In closing, and having regard to the exceedingly reckless and injurious statements which you have made, it is very apt to concur with you that *“while zeal and exuberance in the execution of one's duty may be important qualities, they cannot under any circumstances be an excuse for an attempt to trample and destroy legal rights and our reputation.”*

Yours sincerely,

Maurice Barrett  
Chief Investigator  
for and on behalf of the Contractor General

Copy: The Hon. Bruce Golding, MP, Prime Minister of Jamaica  
Ambassador Douglas Saunders, CD, Cabinet Secretary  
Dr. Wesley Hughes, C.D., Financial Secretary  
Ms. Pamela Monroe-Ellis, Auditor General  
Dr. Omar Davies, MP, Chairman of the Public Accounts Committee of the Parliament of Jamaica  
Dr. Wykeham McNeil, MP, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica  
Senator the Hon. Dorothy Lightbourne, Attorney General  
The Hon. Edmund Bartlett, MP, Minister of Tourism  
Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism  
Mr. John Lynch, Chairman, Jamaica Vacations Limited  
Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited

LINCOLN A. C. EATMON  
JOHN G. LEIBA  
JANICE A. CAUSWELL  
W. JOHN VASSELL, Q.C., LL.B.  
ENID F. CHIN, B.Sc (ECON)  
JEROME I. LEE, B.Sc. (GOVT.), LL.B.  
JANET E. MORRISON, LL.B., LL.M.  
MARGARET A. MOODIE-JERVIS, LL.B.  
PAULINE A. FINDLAY, LL.B.  
HELEN E. EVELYN, LL.B.  
JOANNE E. WOOD, LL.B.  
DONOVAN C. WALKER, LL.B., LL.M. (LON)  
LIANNE E. MAIS-COX, B.A., LL.B.  
COURTNEY A. BAILEY, LL.B.  
KIRK B. ANDERSON, LL.B.  
JERMAINE C. SPENCE, LL.B.  
HYACINTH F. LIGHTBOURNE, BBA, J.D. (MIAMI)

GEORGETTE T. WILTSHIRE, B.A., LL.B.  
PETER W. SIMMONDS, B.Sc., LL.B.  
FRANCINE E. HOWELL-BRYCE, BBA., LL.B. (LIVERPOOL)  
CANDICE T. STEWART, LL.B.  
ROXANNE A. MILLER, LL.B. (LMU)  
TERI-ANN A. LAWSON, B.A. LL.B.  
MICHELLE J. PARKER, B.Sc., LL.B., MBA  
COURTNEY M. WILLIAMS, B.A., LL.B.  
TOPAZ L. M. JOHNSON, B.Sc., LL.B. (LON), M.Sc.  
MARIA L. BURKE, B.A., LL.B., M.Sc.  
SHAUNNA-KAY E. CARTER, LL.B.

**CONSULTANTS**

C. D. R. BOVELL, C.D., M.A., LL.M. (CANTAB)  
DENNIS G. EDMUNDS, B.A. (CANTAB)  
WILLIAM D. PANTON  
O. A. CAROLAINA, B.A. (SUSSEX)

P.O BOX 365  
48 DUKE STREET  
KINGSTON  
JAMAICA, W.I.

TELEPHONE: (876) 922 - 1500  
VOIP (U.S.A.): (678) 202 - 9818  
TELEFAX: (876) 922 - 9002  
(876) 924 - 9106

E-MAIL: info@dunncox.com  
WEBSITE: www.dunncox.com

OUR REF. YOUR REF.  
WRITER'S EXTENSION NUMBER

# COPY

December 21, 2009

Mr. Maurice Barrett  
Chief Investigator  
Office of the Contractor General  
PIOJ Building  
16 Oxford Road  
P.O. Box 5

Dear Sir:

**RE: Conduct of the Office of the Contractor General**

We refer to your letters dated November 19, 2009 and December 14, 2009, as well as to ours of December 10, 2009.

1. We must comment on the fact that you have not made mention, nor for that matter expressed any regret, of the threat which was so patently conveyed by your November 19<sup>th</sup> letter (paragraph 4) which was copied to several eminent persons and which stated as follows:

*"In view of this, we believe that it is important for you to be aware that should DunnCox, in the future, become the subject of the OCG's attention under the Contractor-General's Act, the positions which were conveyed by us, to you, in our letter of November 16, 2009, will be fully enforced against you without condition."*

Despite your unjustified threat, we have not sought an apology or withdrawal as to do so presents no solution to the matter.

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ms/eb/hc/l  
21/12/09  
12.21



Attention: Mr. Maurice Barrett  
Re: Conduct of the Office of the Contractor General

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2. With regard to our comments as to your usage of power, such comments are fair comment upon a matter of public interest and are based upon facts, namely:
  - a. That the OCG's Investigation, and we stress the word 'investigation', of DunnCox commenced post October 28, 2009, a fact which you have expressly admitted; and
  - b. That all letters/requisitions addressed, not copied, to JAMVAC were not copied to the various divisions of government. We made no reference to letters addressed to anyone other than JAMVAC. You have not purported to refute this fact.
3. Whilst we feel compelled to deny your assertion that we have made false allegations against the OCG, we affirm that the use of public funds is a legitimate concern for your Office. Though of course in our view, our client's retention of this Firm was lawful and not in breach of the terms or spirit of any law. We do not say and have not said that it is not a matter which the OCG is not entitled to monitor or investigate or that such monitoring or investigation is an abuse of power. The impression of an abuse of power arose only because of a reasonable apprehension that you appeared to be singling out this Firm for unfair treatment. We have noted, and of course accept, your explanation.
4. Needless to say, we regret that your Office and ourselves have become embroiled in unpleasant exchanges. We regard this as unfortunate and we can only express the hope that it does not continue.
5. ~~You will no doubt permit yourself the reflection that the OCG is a Commission of Parliament and a preeminent public institution and that some degree of tolerance of criticism of its conduct is not inappropriate. It is the law's expectation that public bodies should be open to criticism which underlies the principle and decision in the leading case of *Derbyshire CC v Times Newspapers*.<sup>1</sup>, in which, as you may recall, the House of Lords held that at common law a public body cannot bring an action for defamation because it "would be a serious interference with the free expression of opinion hitherto enjoyed ...if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticized or condemned the management of the country."~~<sup>2</sup>

<sup>1</sup> [1993] A.C.534

<sup>2</sup> Per Schreiner J.A. in *Die Spoorbond v South African Railways* [1946] A.D. 999 at 1012-1013, cited with approval in *Derbyshire* [1993] A.C. at 549

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December 21, 2009

Attention: Mr. Maurice Barrett

Re: Conduct of the Office of the Contractor General

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Yours faithfully,

**DunnCox**

PER:

  
**LINCOLN A.C. EATMON**

- cc: **The Hon. Bruce Golding, M.P., Prime Minister of Jamaica**
- cc: **Ambassador Douglas Saunders, Cabinet Secretary**
- cc: **Dr. Wesley Hughes, C. D., Financial Secretary**
- cc: **Ms. Pamela Monroe-Ellis, Auditor General**
- cc: **Dr. Omar Davies, Chairman of the Public Accounts Committee of the Parliament of Jamaica**
- cc: **Dr. Wykeham McNeil, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica**
- cc: **Senator the Hon. Dorothy Lightbourne, Attorney General**
- cc: **The Hon. Edmund Bartlett, Minister of Tourism**
- cc: **Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism**
- cc: **Mr. John Lynch, Chairman, Jamaica Vacations Limited**
- cc: **Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited**

(3)



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Any reply or subsequent reference to this communication should be addressed to the Contractor-General and the following reference quoted:-

OFFICE OF THE CONTRACTOR-GENERAL  
PIOJ Building  
16 Oxford Road  
P.O. BOX 540  
KINGSTON 5  
JAMAICA, W.I.

No. :

TELEPHONE No.:876-929-8560/6466  
FAX No. : 876-929-2476  
E-mail: mbarrett@ocg.gov.jm

VERY URGENT

**COPY**

2009 December 21

DunnCox  
Attorneys-At-Law  
P.O. Box 365  
48 Duke Street, Kingston  
Jamaica, W.I.

Attention: Mr. Lincoln Eatmon, Esq., Senior Partner

Dear Sirs:

Re: Request for Apology and Withdrawal of Defamatory Statements Made Against the Contractor General and the Office of the Contractor General – In the Matter of the Retention of Legal Services by Jamaica Vacations Limited (JAMVAC) to Provide Responses to the OCG's Formal Requisitions for Information and Documentation to be Supplied under the Contractor General Act

We are in receipt of your letter of even date.

Once again, and quite regrettably, you have chosen to skirt the facts. This is conduct which, we must forcefully assert, is reprehensible and that which would not be expected from a Law Firm of the standing and good reputation of DunnCox. We will respond to the numbered paragraphs of your letter as follows:

Response to Your Paragraph #1

The statement of the Office of the Contractor General (OCG) which you placed in italics, and which you have characterized as "*a threat*", is not a threat. It is a statement of the OCG's mandate under the law. We make no apology for it and, in point of fact, take this opportunity to re-iterate same without any equivocation or condition.

Response to Your Paragraph #2

You have disingenuously ignored the fact that the point in issue is not when the OCG's Investigation was commenced but the reasons and motives which you have attributed to the OCG for same. The reasons and motives which you have placed upon the record have all imputed bad faith, vindictiveness and retribution on the part of the OCG. By ignoring your conduct in this regard, you have played fast and loose with the facts.





Regarding the issue of the persons to whom the OCG's correspondence was copied, you have ignored the fact that the OCG letters which were confined to the American Airlines Investigation were not copied to third parties whereas all of the OCG's letters which had to do with the Retention of Legal Services by JAMVAC, commencing with the OCG's letter of June 10, 2009 to the Permanent Secretary in the Ministry of Tourism, were the ones which were copied to the named third parties.

The accusations which you have leveled against the OCG have, however, expressly stated that the OCG only began copying letters to the named third parties commencing with its letter to you of November 10, 2009. You have been provided with documentary evidence that your assertion in this regard is factually inaccurate and that the reason why the OCG copied all the named Government officials on its JAMVAC Retention of Legal Services related correspondence was because the OCG had deemed it imperative, from the very outset in June 2009, to bring the matter to the formal attention of the relevant State authorities.

Regrettably, you have, however, chosen to set these explanations aside in what appears to be your quest to sacrifice the truth on the altar of expediency and to avoid making an apology to the OCG for your unfortunate conduct.

Response to Your Paragraphs #3, #4 and #5

The OCG is not averse to being constructively criticized. What we will strongly object to is when false information is used to recklessly attack the reputation of the OCG organization and that of the Contractor General. You have unequivocally stated that the OCG's Investigation of the Government contract which was entered into with you by JAMVAC was actuated by "*retribution*". That, Sirs, is not a criticism. It is a manifestly false statement of fact which has unequivocally imputed malice, bad faith and an abuse of office and power on the part of an Independent Commission of Parliament which, under the law, exercises quasi-judicial powers.

Yours sincerely

Maurice Barrett  
Chief Investigator  
for and on behalf of the Contractor General

Copy: The Hon. Bruce Golding, MP, Prime Minister of Jamaica  
Ambassador Douglas Saunders, CD, Cabinet Secretary  
Dr. Wesley Hughes, C.D., Financial Secretary  
Ms. Pamela Monroe-Ellis, Auditor General  
Dr. Omar Davies, MP, Chairman of the Public Accounts Committee of the Parliament of Jamaica  
Dr. Wykeham McNeil, MP, Chairman of the Public Administration and Appropriations Committee of the Parliament of Jamaica  
Senator the Hon. Dorothy Lightbourne, Attorney General  
The Hon. Edmund Bartlett, MP, Minister of Tourism  
Mrs. Jennifer Griffith, Permanent Secretary, Ministry of Tourism  
Mr. John Lynch, Chairman, Jamaica Vacations Limited  
Mr. Lionel Reid, Executive Director, Jamaica Vacations Limited

# APPENDIX III



CABINET SUBMISSION

JAMAICA VACATIONS LIMITED - CONTRACTUAL ARRANGEMENT WITH AIRLINES  
FOR ADDITIONAL SEAT SUPPORT

**CONFIDENTIAL**

1. Cabinet is being asked to approve:
  - i) Jamaica Vacations Limited (JAMVAC) entering into contingent guarantee arrangement with American Airlines and other airlines as economic opportunities arise;
  - ii) the attached contracts between JAMVAC and American Airlines to provide additional flights to Jamaica from Miami, Chicago and Dallas gateways;
  - iii) the Tourism Enhancement Fund facilitating the guarantee for the Letter of Credit with the National Commercial Bank in the amount of US\$1.5M per gateway.

BACKGROUND

**CONFIDENTIAL**

2. Cabinet may recall Decision No. 45/07 dated December 17, 2007, which gave approval for the resuscitation of JAMVAC to more effectively carry out its mandate to:
  - I) promote increased airlift of visitors to Jamaica;
  - II) support other tour operators servicing Jamaica;
  - III) operate in-house charters from selected gateways;
  - IV) support airlift from targeted markets.

OFFICE OF THE CONTRACTOR GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

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**ISSUE**

**CONFIDENTIAL**

3. Globally, the biggest airlines are reducing services, increasing fares, levying surcharges and abandoning destinations as the cost of fuel continues to rise. The entire Caribbean region is now in a crisis as there have been significant cut backs by the major carriers who traditionally service the region. As a result, countries are forced to find creative ways of financing airlift to cater to both tourist and domestic travel.
4. From the United States of America (USA) all major carriers serving the Caribbean have significantly reduced service to the region, causing severe hardships in many islands. It is to be noted that American Airlines is the largest provider of air service from USA to the Caribbean, and they have significantly reduced service to some islands.

**PROPOSITION**

**CONFIDENTIAL**

5. Given its mandate, Cabinet is asked to be mindful of the fact that JAMVAC's *raison d'être* is to develop strategies and respond to economic opportunities through the provision of incentives to commercial carriers to increase airlift to Jamaica. Accordingly, JAMVAC has favourably considered a verbal, unsolicited proposal from American Airlines to provide additional seats from three American gateways for a guarantee of US\$1.5M each. These are daily flights from Dallas, five flights per week from Chicago and five flights from Miami. The total commitment of US\$4.5M will be needed to leverage these additional seats. (See Appendix 1). This amount may remain unused, but has to be committed as a safeguard.

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

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6. The Ministry of Tourism proposes to pool the resources of JAMVAC with the marketing support from Jamaica Tourist Board (JTB) to ensure the flights are fully supported. This will guarantee that the funds committed are not 'called upon'. The JTB will also be assigning its Regional Director for Airlines to work directly with American Airlines on a day-to-day basis to monitor the programme so as to minimize expenditure and not to encounter surprises.

### CONSULTATIONS

**CONFIDENTIAL**

7. The Ministry of Finance and the Public Service was consulted on the subject matter and their response is attached as Appendix 2.
8. The Office of the Attorney General was asked to peruse the Contract and provide comments, attached as Appendix 3. Cabinet is asked to note, however, that the Contracts issued by American Airlines are standard and are applicable to all countries to which this service is provided. They were therefore unwilling to draft a special contract for Jamaica.

### FINANCIAL CONSIDERATIONS

**CONFIDENTIAL**

JAMVAC's 2008/2009 budget allocation allows a maximum spend of US\$2.5M on seat support and administrative expenses. This however, is grossly inadequate, given the current challenges with respect to airlift. Based on the attached letter from the Ministry of Finance and the Public Service, JAMVAC approached the Tourism Enhancement Fund (TEF) for support. At the TEF Board meeting of July 23, 2008, a guarantee in the amount of US\$4.5M was approved on behalf of JAMVAC, in favour of American Airlines. This decision was taken in the context

(6)

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of the first of the Principal Objects of the Tourism Enhancement Fund Act, 2004 which speaks to the growth and development of the tourism sector:

**Section 3 (a) *implement projects and programmes which impact on the growth and development of the tourism sector;***

Please see Appendix 4, attached.

The guarantee, however, has not yet been issued.

**RECOMMENDATION**

**CONFIDENTIAL**

Cabinet is being asked to approve:

- i) Jamaica Vacations Limited (JAMVAC) entering into contingent guarantee arrangement with American Airlines and other airlines as economic opportunities arise;
- ii) the attached contacts between JAMVAC and American Airlines carrying additional flights from Miami, Chicago and Dallas gateways, (typical contract attached as Appendix 5);
- iii) the Tourism Enhancement Fund facilitating the guarantee for the Letter of Credit with the National Commercial Bank in the amount of US\$1.5M per gateway.

OFFICE OF THE CONTROLLER-GENERAL  
1st FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

  
Edmund Bartlett, M.P.  
MINISTER

**CONFIDENTIAL**

September 9, 2008

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# JAMVAC COMMITMENT F/Y 2008/2009

## AMERICAN AIRLINES

ROTATION	SEATS	RISK
Miami 5 Flights per week	38,480	1.5
Chicago 5 Flights per week	38,480	1.5
Dallas 1 Flight daily	53,872	1.5
<b>TOTAL</b>	<b>130,832</b>	<b>4.5</b>

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**JAMVAC COMMITMENT FY 2008/09**

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	<b>ADVERTISING</b>	<b>RISK</b>	<b>TOTAL</b>
	<b>US\$</b>	<b>US\$</b>	<b>US\$</b>
<b>Canada Vancouver, 17 flights</b>	71,400	314,160	385,560
<b>Italy-summer Charter</b>	100,000		100,000
<b>Russia</b>	100,000		100,000
<b>Spain and Portugal</b>	336,000		336,000
<b>Sub-total</b>	<b>607,400</b>	<b>314,160</b>	<b>921,560</b>
<b>Germany Request from LTU, for risk – pending</b>		900,000	900,000
<b>Estimating risk for Condor</b>		600,000	600,000
<b>TOTAL</b>	<b>607,400</b>	<b>1,814,160</b>	<b>2,421,560</b>

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2008.05.13

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# Status Report on Charter Seats from Continental Europe

## Summer 2008

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### Germany ( 2 flights )

Condor	Direct	Thursday	7263 seats
LTU	Shared <sup>1</sup>	Thursday	<u>4160 seats</u>
		Total	= <u>11423 seats</u>

### Belgium ( 2 flights )

Jet Air Fly	Shared	Wednesday	4154 seats
Jet Air Fly	Shared	Saturday	<u>4288 seats</u>
		Total	= <u>8442 seats</u>

### The Netherlands ( 1 flight )

Arkefly	Shared	Thursday	<u>4154 seats</u>
---------	--------	----------	-------------------

### Spain ( 4 flights )

Air Comet	Direct	Monday	6136 seats
Iberoworld	Direct	Monday	4956 seats
Iberoworld	Direct	Thursday	4248 seats
Iberoworld	Direct	Friday	<u>4012 seats</u>
		Total	= <u>19352 seats</u>

### Portugal ( 2 flights )

Orbest	Direct	Monday	5192 seats
Orbest	Direct	Wednesday	<u>2832 seats</u>
		Total	= <u>8024 seats</u>

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<sup>1</sup> Shared with another Caribbean destination

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Italy ( 3 flights )

Livingston  
Volare/Air Europe  
Livingston<sup>2</sup>

Shared  
Shared  
Direct

Wednesday 3380 seats  
Sunday 2210 seats  
Sunday 3120 seats

Total = 9130 seats

Grand Total = **60525 seats**

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**Winter 2008**

Germany ( 2 flights )

LTU Direct  
Condor Direct

Saturday 6006 seats  
Thursday 6725 seats

Total = 12731 seats

Belgium ( 2 flights )

Jet Air Fly Shared  
Jet Air Fly Shared

Wednesday 2814 seats  
Saturday 2680 seats

Total = 5494 seats

The Netherlands ( 1 flight )

Arkefly Shared

Thursday 2814 seats

Spain ( 1 flight )

Iberoworld Direct

Thursday 5900 seats

Grand Total = 26939 seats

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<sup>2</sup> Livingston flight to be confirmed.

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**CURRENT CONFIRMED AND PENDING FLIGHTS OUT OF  
CONTINENTAL EUROPE FOR SUMMER 2008 AND WINTER 2008/09**

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**GERMANY:**

Summer: 2 ½ flights from Frankfurt and Dusseldorf  
Winter: 2 full flights - 1 from Dusseldorf, 1 from Frankfurt

**SPAIN:**

Peak Summer: 4 flights – 3 Madrid, 1 Barcelona (new)  
Winter: 1 flight out of Madrid

**PORTUGAL:**

Peak Summer: 2 flights  
Winter: none

**ITALY:**

Peak Summer: 3 flights  
Fall: 1 flight  
Winter: 5 flights pending

**RUSSIA:**

Winter: 2 flights pending

**BELGIUM:**

Summer: 2 flights  
Winter: 2 flights

**HOLLAND:**

Summer: 1 flight  
Winter: 1 flight

**CZECH REPUBLIC:**

Winter: 3 rotations pending

**UKRAINE:**

Still negotiating for a limited series

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Italy

It is too early to confirm flights from this market for the upcoming winter. However, there are plans for 2 Livingston flights, 1 Neos, 1 Volare/Air Europe and 1 Blue Panorama.

We are being advised that the flights and their operators are not to be named as yet, but we expect a total of 5 flights during the peak winter months flying from Milan and Rome to Montego Bay.

Some will be shared with other destinations in the Caribbean.

Russia

We are awaiting confirmation on one flight for 12-15 weeks in winter from Russia, as well as another from Ukraine.

Czech Republic

3-4 rotations from Prague to Montego Bay are planned for this winter.

**Estimated seat count from Italy, Russia and the Czech Republic is 15648 bringing total winter seats to approximately 42587.**

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(B)



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Telephone No. 876-967-3309, 876-967-3310  
Fax No: 876-922-8804  
Website: <http://www.mof.gov.jm>  
Email: [hmf@mof.gov.jm](mailto:hmf@mof.gov.jm)

MINISTRY OF FINANCE AND THE PUBLIC SERVICE  
30 NATIONAL HEROES CIRCLE  
P.O. BOX 512  
KINGSTON  
JAMAICA

June 10, 2008

**CONFIDENTIAL**

Hon Edmund Bartlett, MP  
Minister of Tourism  
Ministry of Tourism  
64 Knutsford Boulevard  
Kingston 5

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

Dear Minister Bartlett

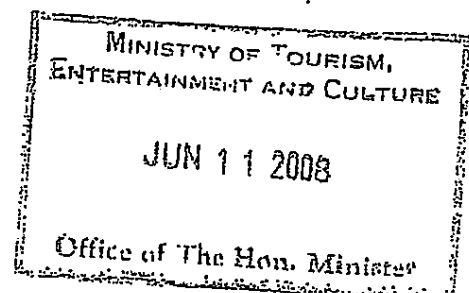
**Re: Commitment of US\$4.5 million for Airlift/Seat Risk Support on Flights to Jamaica**

With regards to the captioned subject, I advise that you provide American Airlines with the commitment predicated against your existing Budget.

On the understanding that you monitor the programme carefully so as to minimize expenditure on seat support, the Ministry of Finance and the Public Service will support the seat support request and undertakes to include such additional expenditure in the First Supplementary Estimates subject to the approval of Cabinet and Parliament.

Yours sincerely

Audley Shaw, MP  
Minister of Finance and the Public Service

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Telephone: (876) 906-2414-7  
 Facsimile: (876) 754-5158  
 E-Mail: attorneygeneral@agc.gov.jm

ATTORNEY GENERAL'S CHAMBERS  
 1<sup>st</sup> Floor – North Tower  
 NCB Towers  
 2 Oxford Road  
 Kingston 5

Reference Number: AD478

July 22, 2008

Jamaica Vacations Limited  
 C/o Ministry of Tourism  
 64 Knutsford Boulevard  
 Kingston 5

**CONFIDENTIAL**

Attention: Mr. Lionel Reid

**Re: Agreements between Jamaica Vacations Limited and American Airlines**

Reference is made to the proposed agreements at caption for the provision of commercial air service between Chicago, Miami and Dallas/Fort Worth, U.S.A. and Montego Bay, Jamaica. I have reviewed the agreements and now out set my comments below.

Opening paragraph

1. I note that the effective date of the agreements are November 2, 2008 and January 31, 2009. It would be prudent to have the agreements effective as of the date of signing, but that the obligations regarding provision of commercial air services will not arise until November 2, 2008 in the case of the Dallas and Miami agreements and January 31, 2009 for the Chicago agreement. The date referenced on the opening paragraph of the agreements should therefore reflect the date of signature by the last signatory to the agreements.
2. Upon your instructions, the address of Jamaica Vacations Limited ("JamVac") in all three agreements should be changed to 64 Knutsford Boulevard, Kingston 5, Jamaica.

Clause 2 - Air Service

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3. Note that American Airlines Inc ("American") has reserved to itself the right to make "operational decisions" regarding, among other things, the frequency and continued operation of the Air Service (see last sentence of last paragraph). This clause could be interpreted as the reservation of a right to reduce the frequency of services as set out in the Schedule or to terminate the services all together without discussion with and approval of JamVac. Such a power goes against the intent of the contract which is to secure and reserve continuous air service between the three US cities and Montego Bay during the contract period. I believe that this right should only be exercisable in limited and specified circumstances. These circumstances should be outlined in this clause 2. Any changes outside of these circumstances should then be subject to agreement of the parties.
4. There is need to include in the contract an obligation of American to take all steps necessary and to obtain all required approvals and provide such notifications as may be prescribed

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 P.O. BOX 546  
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Jamaica Vacations Limited  
Attention: Mr. Lionel Reid  
July 22, 2008

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under applicable law and regulations, so as to ensure that it can provide the Air Services during the Air Service Period as defined in the respective agreements.

### Clause 3 – Minimum Revenue Requirement

5. A definition of "Air Service Passenger", as referred to in paragraph d of all three agreements, should be included. I assume this is a reference to the revenue passengers who travel round trip on any Air Service Flight during the Air Service Period.

### Clause 4 – Revenue Calculation

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6. At paragraph a. the words "*for Flight Charge*" should be inserted between "the amount payable" and "as provided in Schedule 1 hereto" at the end of the paragraph in all three agreements for clarity.
7. In paragraph c. of all three agreements, I assume the reference to "Deduction" is to the 3.2% deduction specified in Schedule 2. If so I propose that the words "a percentage as set forth in the respective Schedule" in the second line of this sub-paragraph c. be replaced with the following:

*"the percentage as specified in Schedule 2"*

8. Who receives the Co-Op Revenue (see paragraph d.)? I assume it is American. If yes, then this should be stated for clarity.
9. In light of the provisions of clause 5 a. which gives American to the end of the month following the Settlement Period to reconcile the Total Revenue and submit its invoice, it may be prudent to require a longer period within which JamVac may audit American's financial records. In the event of a dispute arising as to the amounts payable after the invoice is received by Jam Vac some 30 days after the end of the Settlement Period, JamVac will not be out of time to commission an independent audit of American's records. I would therefore suggest in sub-paragraph f. of all three agreements, that provision be made for an audit by JamVac within 60 or 90 days after the end of the Settlement Period.

### Clause 5 – Revenue Reconciliation

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10. As there is only a single Settlement Period provided for in this agreement, I suggest that the last sentence of paragraph b. in the Chicago and Dallas agreements, and paragraph c. of the Miami agreement, be deleted or that the language be amended to read as follows:

*In the event that the Agreement is amended and provision is made for an additional settlement period or additional settlement periods, it is understood that any Revenue Excess in respect of the Settlement Period or any additional settlement period, shall not be applied to meet the Minimum Revenue Requirement of any subsequent settlement period.*

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Jamaica Vacations Limited  
Attention: Mr. Lionel Reid  
July 22, 2008

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- 11. In paragraph b of the Miami agreement, new and undefined terms have been inserted such as – “AA non-stop seats”, “revenue guaranteed flight” and “minimum revenue flight”. These terms should either be defined or described by using existing terms. For example, could “minimum revenue flight” be described in terms of the Minimum Revenue Requirement? Is “revenue guaranteed flight” a reference to an Air Service Flight?

Clause 7 – Payment Reconciliation

**CONFIDENTIAL**

- 12. I do not recommend acceptance of the “highest rate permitted by applicable law” as a basis for determining the default interest rate. A fixed rate or formula should be inserted instead. I do not know how the highest rate permitted by law will be determined – will there be a review of case law; is there an applicable statute; is there a government body that prescribes a maximum amount? There is no source of the determination clearly identified. It should also be ascertained whether a rate of 12% is reasonable in the circumstances and not a penalty. Perhaps this advice can be sought from someone within the jurisdiction.

Clause 9 – Guarantee

- 13. Note that paragraph a. of all three agreements require the issue of a letter of credit on behalf of JamVac by a financial institution acceptable to American. It may therefore be prudent to ascertain which institution would be acceptable to American, so that arrangements are not made with an institution that is later rejected by American.

Clause 10 – Termination and Default

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- 14. In paragraph a. sub-clause (i); American has the right to unilaterally terminate the agreement on ground that the Sangster International Airport facilities are “inadequate for American to commence service”. Such a determination should be made by an independent body such as the United States Federal Aviation Authority. I suggest that this portion of the clause be deleted and a new sub-clause (iii) be added to read as follows:

*or (iii) the United States Federal Aviation Authority downgrades the rating of the Sangster International Airport to a Category 2 airport.*

Also in paragraph a. sub clause (A) of all three agreements, the agreements can be terminated by a voluntary or forced grounding of aircraft types. American should be asked to clarify the circumstances in which there would be need for a voluntary grounding. I do not believe that American should be permitted to unilaterally terminate the agreement unless grounding of aircraft is done for purposes of safety and security. Also, American should explain why the grounding, whether voluntary or forced, of one or more aircraft types should affect the agreement. Perhaps such an event should only give rise to unilateral termination of the agreement by American where the grounding affects aircraft types being used for provision of the Air Services under the particular agreement.

- 16. Note the ground of termination for breach by either party. The obligation of American to provide a specified number of flights, or provision of the flights at all, is eroded by the reservation of American to make operational decisions regarding the operation of the Air

(17)

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16 OXFORD ROAD  
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Jamaica Vacations Limited  
 Attention: Mr. Lionel Reid  
 July 22, 2008

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Service (note my comments at paragraph 3 of this letter above). It will therefore be difficult for JamVac to declare a breach of contract where American does not provide the Air Services or does so with less frequency than set out in the Schedule, if American indicates that it is acting in exercise of its power to make operational decisions as per clause 2 of the agreements. I therefore think it important to revisit clause 2 to ensure that there are clearly defined performance obligations to be fulfilled by American.

**Clause 12 – Confidential Information**

**CONFIDENTIAL**

17. I do not think that the obligation to keep confidential the other party's confidential information should include an obligation to protect the other party's information by applying the same measures it would take to protect its own information. If for example JamVac's measures to protect its own information are stringent, including taking legal proceedings, it would be expected to provide similar protection against disclosure of American's information under the agreement. I think that the measures applied to prevent disclosure of the other party's information should be left up to the discretion of that party, bearing in mind its own risk of breaching the confidentiality clause.

**Clause 13 – Promotional Materials**

18. In the event that American may publish promotional materials of its own that relate to JamVac and the air services to be offered pursuant to the agreement, a reciprocal clause requiring JamVac's authorisation of any such materials should be considered.

**Clause 14 – Fares**

**CONFIDENTIAL**

19. I note that American has sole discretion to determine its fares. If it sets fares that are too low, JamVac could incur a loss where the Total Revenue (which consists of the sums actually paid by the passengers) is less than the Minimum Revenue Requirement (which is based on a set price per passenger and per flight as set out in Schedule 2). There should be some assurance in the agreement that fares cannot be set so low (taking into account the other passenger charges for cargo excess baggage etc) that JamVac will incur a loss under the agreement in light of the fixed Per Revenue Passenger Charge. Perhaps a minimum round trip fare can be established in the agreements.

**Clause 15 – Governing Law**

20. In most government contracts that are governed by US Law, we try to provide for the laws of New York to be the governing law. It is a jurisdiction with which the Government of Jamaica is familiar, having concluded many transactions governed by these laws, and the Government has a consular presence there. The same considerations may not apply to JamVac which is a private company, however, we would suggest that American be asked to consider application of New York Law as the governing law of the agreement rather than the laws of the State of Texas. Note that they have already proposed New York as the seat of arbitration for disputes (see clause 16 a.) and propose that the courts of New York have jurisdiction for legal proceedings (see clause 16. d.).

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Jamaica Vacations Limited  
Attention: Mr. Lionel Reid  
July 22, 2008

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Clause 16 – Jurisdiction/Dispute Resolution

21. I am not au fait with US law and therefore suggest that American be asked to clarify on what basis the Secretary of State of the State of New York could be a process agent for JamVac, a Jamaican company. Note paragraph e. speaks to each party designating the Secretary of State and CT Corporation as their process agents. The appointment of CT Corporation, a company that provides among other things process server services for other entities, has cost implications for JamVac. CT Corporation's terms of engagement as process agent for JamVac should be ascertained, if not done already, before JamVac agree to this clause.

Clause 19 – Indemnification

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22. I suggest the deletion of the term "grossly" in paragraphs a. and b. of this clause. Both parties should be required to indemnify the other for loss incurred as a result of any of its acts of negligence, errors and omissions, and not just the grossly negligent acts, errors and omissions. Gross negligence requires a higher standard of proof on the part of the party who has suffered the loss, but does not necessarily result in a loss greater than that suffered as a result of an act of ordinary negligence of the other party.

I have been advised however that airlines may not be able to obtain insurance coverage for ordinary negligence and therefore American may use this as a basis to reject my suggestion. If this is in fact the case, then I would not strongly pursue amendment of this clause. I would point out however that JamVac would have to bear the risk and cost of claims from third parties for American's ordinary negligence, without a right to be indemnified for these costs.

Clause 20 – Waiver of Consequential Damages

23. I would suggest that special damages not be excluded. Under our laws, special damages speaks to loss or costs suffered by a person which results directly from the action or omission of another person. The parties should be permitted to claim compensation for this type of loss from the other party.

Clause 21 – Insurance

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24. The words "insured Section 19 a. of this Agreement" in sub-clause (i) of paragraph a. of all three agreements, should be replaced with "*insured against risks outlined in Section 19 a. of this Agreement*".

25. JamVac should ascertain whether the nature of the risks contemplated in clause 19 b. and the nature of JamVac's obligations under the contract justify the requirement for the type and level of insurance required in clause 21 b.

Clause 22 – Assignment

26. Reference is made to delegation of obligations as opposed to assignment by American. It should be clarified whether American will continue to be substantively responsible for the

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P.O. Box 546  
Kingston, Jamaica

Jamaica Vacations Limited  
Attention: Mr. Lionel Reid  
July 22, 2008

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American related obligations under the agreement, in the event of a delegation. If so, this should be stated.

Clause 26 - Notices

27. Please advise whether the address for notices to JamVac should also reflect the company's Jamaican address.

**CONFIDENTIAL**Schedule 1

28. Paragraph 1: Note that in paragraphs 1a. and b. American can solely determine the percentage of the Flight Charge covered by fuel cost. It should be ascertained whether this percentage varies from flight to flight. If not then the percentage should be ascertained, fixed and specified in this schedule. This ensures certainty in the formula to be applied in determining the new Flight Charge where there is a fluctuation in the price of fuel. If the percentage varies, it may be prudent for the parties to agree and fix a band of that variation so that on any occasion JamVac is not surprised with an unusually high multiplier for determining a new Flight Charge, caused by a decision of American to attribute a very high percentage of the Flight Charge covering fuel costs.

29. It would be helpful if an illustration of the application of the formula is included so that it is clear to all parties how the adjustment in flight charge is determined. Note that an example was used to illustrate the determination of the portion of the flight revenue to be applied to the revenue earned under the agreement in the Miami agreement (see clause 5 b. of the Miami agreement). This type of illustration should also be used to explain the flight charge adjustment formula in Schedule 2 of all three agreements.

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30. Paragraph 2: As drafted, the Fuel Adjustment Period, and therefore the application of special formulas to determine the Flight Charge, is so defined that the formula applied in a fuel price increase (paragraph 1 a.) or that in a fuel price decrease (paragraph 1 b.) continues until the price respectively falls or increases to trigger the other formula. I think that it is tidier for the Fuel Adjustment Period and application of a formula to end when the fuel price readjusts to a price in the vicinity of the Initial Average Fuel Price (i.e. less than US\$3.12 to more than US\$2.72). I therefore propose the following description of the Fuel Adjustment Period and replacement of the last sentence of this paragraph as follows:

*For the avoidance of doubt, each Fuel Adjustment Period, (a) for purposes of application of the formula set out in paragraph 1 a. above, shall begin on the date that the Average Fuel Price increases to US\$3.12 or above and ends when it decreases below US\$3.12, and (b) for purposes of application of the formula set out in paragraph 1 b. above, shall begin on the date that the Average Fuel Price decreases to US\$2.72 or below and ends when it increases above US\$2.72.*

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Jamaica Vacations Limited  
Attention: Mr. Lionel Reid  
July 22, 2008

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Exhibit A – form of letter of credit

31. The letter of credit should further require that the unpaid invoice from American to JamVac accompany any request or drawing of funds from the bank. This can perhaps be addressed in the second paragraph of the form of letter of credit.

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Exhibit B

32. I would suggest that the words "or any other agreement between American and Jamaica Vacations Limited" at the end of the draft letter, be deleted. The Letter of Credit, unless otherwise agreed by the parties and the financial institution, relates to the payment obligations of JamVac under the agreement only and therefore payment in respect of a default under that agreement, and no other, should be claimed from the letter of credit.

Yours faithfully,

**Chenée Riley (Miss)**  
*Assistant Attorney General*

Copy: Senator the Honourable Dorothy Lightbourne, Attorney General and Minister of Justice

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(21)

APPENDIX 4  
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JAMAICA

No. 27 - 2004

I assent,

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Governor-General.

21<sup>st</sup> day of December, 2004

AN ACT to Provide for a Tourism Enhancement Fee to be paid by incoming airline and cruise ship passengers where the journey originates outside the Island and for matters incidental thereto or connected therewith.

[22<sup>nd</sup> day of December, 2004]

BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica, and by the authority of the same, as follows:—

- 1. This Act may be cited as the Tourism Enhancement Act, 2004. Short title.
- 2. In this Act— Interpretation.

“aircraft” means commercial or private aircraft;

“authorized officer” means an officer authorized by the Minister to carry out a function under section 6(1)(b);

“Board” means the Board of Management of the Fund, established under section 11;

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“carrier” means—

- (a) any person (whether incorporated or not) transporting passengers by ship or aircraft on any voyage or flight to or from Jamaica;
- (b) the master or other person in command or control of the transporting ship or aircraft;
- (c) the agent in Jamaica of any person referred to in paragraph (a); and
- (d) if the person referred to in paragraph (a) or the agent referred to in paragraph (c) is a corporation, every director and manager of that corporation;

“Fund” means the Tourism Enhancement Fund established under section 9;

“ship” means a steamship or any other ship, boat, lighter or other craft of any description used for transport by water;

“tourism enhancement fee” means the fee imposed by section 4; and

“traveller” means a person who travels to Jamaica and proposes to return, by sea or by air, to any place outside Jamaica.

Principal  
objects of  
Act.

3. The principal objects of this Act are to—

- (a) implement projects and programmes which impact on the growth and development of the tourism sector;
- (b) encourage better management of environmental resources in Jamaica;
- (c) enhance the overall tourist experience in Jamaica; and
- (d) provide for the sustainable development of the tourism sector.

Tourism  
Enhancement  
Fee.

4.—(1) Subject to the provisions of this Act, there shall be paid by each traveller, a tourism enhancement fee of—

- (a) US\$10 or the Jamaican dollar equivalent, in respect of travel by air;

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**AIR SERVICE AGREEMENT**

This Air Service Agreement (this "Agreement") is made and entered into as of November 2, 2008, (the "Effective Date") by and between American Airlines Inc., a Delaware corporation with its principal offices at P. O. Box 619616, Dallas/Fort Worth International Airport, Texas 75261-9616 ("American"), and Jamaica Vacations Limited, with principal offices located at ~~4950 S.W. 72<sup>nd</sup> Avenue, Miami, Florida 33155~~ <sup>64 Knutsford Boulevard</sup> ("Guarantor").  
 Kingston 5 JAMAICA

1. Term.

This Agreement shall commence upon the Effective Date and, unless sooner terminated in the manner provided for herein, shall remain in full force and effect until December 18, 2009 (the "Term").

2. Air Service.

American shall provide regularly scheduled passenger air service between Miami International Airport ("MIA") and Sangster International Airport, Montego Bay, Jamaica ("MBJ") in both directions (the "Air Service", and each round trip flight performed by American under the Air Service, an "Air Service Flight"), effective November 2, 2008 through November 18, 2009 (the "Air Service Period") in accordance with the schedule attached hereto as Schedule 2.

American agrees to schedule an aircraft to perform the Air Service. American reserves the right to make all operational decisions regarding the Air Service, including, but not limited to, aircraft type and configuration, timing of arrival/departure, frequency of service, and continued operation of the Air Service.

3. Minimum Revenue Requirement.

- a. The "Flight Charge" for each Air Service Flight shall be specified in Schedule 2.
- b. The "Per Revenue Passenger Charge" for each Air Service Flight shall be specified in Schedule 2.
- c. The "Settlement Period" shall be the Air Service Period.
- d. The "Minimum Revenue Requirement" shall mean the Flight Charge as set forth in Schedule 2 for each Air Service Flight multiplied by the actual number of Air Service Flights operated by American during each Settlement Period, plus the Per Revenue Passenger Charge as set forth in Schedule 2 for each round-trip revenue Air Service Passenger who actually travels during the Settlement Period.
- e. American and Guarantor agree that the Total Revenue (as defined in Section 4.e below) for each Settlement Period must equal or exceed the Minimum Revenue Requirement.

4. Revenue Calculation.

- a. American and Guarantor agree that notwithstanding, and in addition to, the provisions of Section 10.a hereof, in the event of certain changes in the average price per gallon that American pays for jet fuel American will adjust the amount

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payable as provided in Schedule 1 hereto.

- b. For purposes of this Agreement, "Segment On-Board Revenue, Excess Baggage Fees and Cargo Revenue" for each Air Service Flight shall be the total amount paid by passengers in connection with the applicable Air Service Flight, less applicable taxes, and shall be rate-prorated by segment. A rate-prorate is used to divide total On-Board Revenue, Excess Baggage Fees and Cargo Revenue paid per Air Service Flight among the actual number of segments flown by an Air Service passenger according to the ratio of each segment's local fare to the sum of all the local fares applicable to the passenger's actual itinerary.
- c. For purposes of this Agreement, "Net Revenue" for each Air Service Flight shall be established by deducting a percentage as set forth in the respective Schedule (each a "Deduction") from the Segment On-Board Revenue, Excess Baggage Fees and Cargo Revenue for such Air Service Flight. American and Guarantor agree that a Deduction is an agreed upon amount that reflects all cost attributable to credit card fees, commissions and overrides, and that there shall be no other deductions with respect to such fees, commissions and overrides in connection with the calculation of Net Revenue or Total Revenue as defined in Section 4.e.
- d. For purposes of this Agreement, "Co-Op Revenue" shall be the marketing component of revenue received from third parties related to the purchase of AAdvantage® miles.
- e. For purposes of this Agreement, "Total Revenue" shall be the sum of the Net Revenues, including Co-Op Revenue, for all of the Air Service Flights operated by American during the Settlement Period.
- f. American's Marketing Information Reporting System ("MIRS") shall be the sole source of information for calculating Segment On-Board Revenue, Excess Baggage Fees, Cargo Revenue, Net Revenue, Co-op Revenue, and Total Revenue. Notwithstanding the foregoing, Guarantor shall have the right, upon providing at least five (5) business days prior written notice to American, to conduct, at Guarantor's sole expense, an audit, within thirty (30) days, following the close of the Settlement Period. Such audit may examine the information and documents used to calculate Segment On-Board Revenue, Excess Baggage Fees, Cargo Revenue, Net Revenue, Co-op Revenue, and Total Revenue received by American for Air Service Flights associated with this Agreement. Any such audit must be reasonable in all respects, and must be performed during regular business hours and without affecting American's regular business operations.

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5. Revenue Reconciliation.

- a. American will reconcile the Total Revenue during each Settlement Period against the Minimum Revenue Requirement for such Settlement Period no later than the last business day of the calendar month following the end of the Settlement Period.

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- b. Onboard revenue will be calculated as follows:

Divide the total number of AA nonstop seats in the MIA-MBJ market by the number of seats on the revenue guaranteed flight. This determines the percentage of the revenue that will be applied to the minimum revenue flight. An example follows:

Example:

- 480 - Total AA nonstop seats
- 148 - Seats on revenue guaranteed flight
- 30.8% - Percentage of seats

The above example reflects that the minimum revenue flight would receive 30.8% of the revenue on all AA nonstop flights between MIA-MBJ.

- c. If the Total Revenue is more than the Minimum Revenue Requirement for such Settlement Period, a "Revenue Excess" shall be deemed to have occurred in the amount of the actual difference between the Total Revenue and the Minimum Revenue Requirement. In such event, American will retain the Revenue Excess. In any event, such Revenue Excess may not be applied to meet the Minimum Revenue Requirement of the following Settlement Period.
- d. If the Total Revenue is less than the Minimum Revenue Requirement for such Settlement Period, a "Revenue Shortfall" shall be deemed to have occurred in the amount of the actual difference between the Total Revenue and the Minimum Revenue Requirement. In such event, American will invoice Guarantor for the Revenue Shortfall.

- 6. (Reserved).

- 7. Payment Reconciliation.

American shall provide an invoice to Guarantor no later than the last business day of the calendar month following the end of the Settlement Period, expiration or termination of the Agreement. Such invoice shall include the Revenue Shortfall incurred during such Settlement Period, if any. Guarantor shall pay such invoice to American within a reasonable time frame not to exceed fifteen (15) business days after receipt of such invoice. All payments hereunder shall be made no later than their respective due dates by wire transfer pursuant to wiring instructions given by American or by other means of payment agreed in writing by American. Guarantor agrees to pay interest on any overdue payment (including without limitation any Revenue Shortfall) from the date such payment is due hereunder until the date such payment is received by American at the lesser of the following: (i) the highest rate permitted by applicable law or (ii) an annual rate of 12%.

- 8. (Reserved).

- 9. Guarantee.

- a. In consideration of the Air Service provided by American, on or before November 2, 2008, Guarantor shall establish a letter of credit issued by a financial institution acceptable to American and in the form of Exhibit A attached hereto, in the amount of US\$1,500,000 (the "Letter of Credit").

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 1ST FLOOR, PILOJ BUILDING  
 16 OXFORD ROAD  
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- b. The Letter of Credit will be irrevocable and will provide that American may draw upon all or any part thereof at any time upon presentation to the issuing financial institution of a letter, in the form of Exhibit B attached hereto, signed by an authorized vice-president of American stating that American is entitled to draw upon the Letter of Credit for past due amounts owed under this Agreement.
- c. American shall have the right to draw upon the Letter of Credit to recover any past due amounts that Guarantor owes to American under this Agreement.
- d. Upon termination or expiration of this Agreement and upon payment to American of all amounts owed to American under this Agreement, American agrees to give notice to the issuing financial institution authorizing it to release and cancel the Letter of Credit and, upon the financial institution's written request, American agrees to return the Letter of Credit to the financial institution.

10. Termination and Default.

This Agreement may be terminated by the party specified below (after having given any applicable notice specified below) upon the happening of any of the following events:

- a. By American, if (i) American is unable to obtain the governmental or other approvals necessary to commence the Air Service or if American determines in its sole discretion that the operating facilities at MBJ are inadequate for American to commence service at MBJ; (ii) Guarantor fails to make any payment when due and does not make such payment within five (5) days after written notice or demand thereof; or (iii) any of the following events occur: (A) a forced or voluntary grounding of one or more of American's aircraft types or (B) a greater than 35% increase in the average price per gallon that American pays for jet fuel as compared to the average price per gallon that American paid as of the Effective Date.
- b. By either party, if the other party is in breach or default under any provision of this Agreement and such other party does not cure such breach or default within five (5) days after the non-breaching or non-defaulting party gives written notice to the other party specifying the breach or default.
- c. By either party, with or without cause or penalty upon not less than one hundred twenty (120) days prior written notice to the other party. The effective date of termination shall be as stated in such written notice of termination but not earlier than one hundred twenty (120) days following such written notice.

11. Remedies Upon Termination.

- a. A termination pursuant to Section 10.a or 10.b shall not limit the non-breaching or non-defaulting party's right to pursue or enforce any of its rights under this Agreement or otherwise.
- b. Any termination or expiration of this Agreement shall not affect Guarantor's obligation to pay American all amounts owing to American as of the effective date of such expiration or termination.
- c. In the event of any termination or expiration of this Agreement for any reason, Guarantor shall pay all amounts owed to American as of the effective date of

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expiration or termination, in accordance with the provisions of this Agreement, within three (3) business days after receipt of an invoice from American.

12. Confidential Information.

- a. Each party agrees to hold in strict confidence all confidential and proprietary information, either designated by the party disclosing such information as such or under reasonable circumstances to be considered as such, whether in written, oral or other form, which it received from the other party prior to, or in the course of, this Agreement (collectively, "Confidential Information"). Each party further agrees to use the Confidential Information solely to perform or to exercise its rights under this Agreement, and at a minimum to take all measures necessary to protect against the disclosure or use of the Confidential Information as it takes to protect its own proprietary or confidential information (but in any case no less than reasonable measures). Confidential Information includes, without limitation, (i) the terms of this Agreement, and (ii) flight and accommodations booking information related to the Air Service.
- b. Each party agrees that it will not disclose any Confidential Information to any third party without the prior written consent of the other party, (i) except when required to do so by law or by a court of competent jurisdiction; (ii) except to attorneys, accountants or lending institutions of either party, which will be informed of and will be required to maintain the confidentiality of such information; or (iii) unless such provisions are publicly known through no disclosure that is prohibited hereunder.

13. Promotional Materials.

Guarantor shall submit to American Airlines for review and approval, prior to publication or use, the portion of any and all artwork, scripts, copy, advertising, promotional materials, direct mail, press releases, newsletters or other communications or any other publicity published or distributed by Guarantor (or at its direction or authorization) that specifically references this Agreement, the Air Service, American or any of American's Affiliates, or uses any trademark, service mark, logo or trade name of American or any of its Affiliates ("American Marks") (collectively, the "Promotional Materials"). All such Promotional Materials shall follow at a minimum the Corporate Graphics Standards available on <http://www.aadams.com>. American shall have the right, at its sole discretion, to modify the graphics standards and disclaimers from time to time. All promotional or informational material distributed or electronically transmitted by Guarantor using the American Marks will require the tag line listing the marks and stating "are registered trademarks of American Airlines, Inc." American agrees to respond to Guarantor within five (5) business days after receipt of the Promotional Materials with written approval or written request for changes. Guarantor further agrees that no changes will be made to any of the Promotional Materials after approval by American unless such changes are first approved by American in writing. For the purpose of this Agreement, "Affiliate" shall mean, with respect to either party, any person directly or indirectly controlling, controlled by, or under common control with, such party.

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14. Fares.

American agrees to establish and modify, as needed, the air fares for the Air Service and agrees to provide yield and inventory management services with respect thereto. Guarantor acknowledges that American has agreed to establish and modify these air fares and to provide yield and inventory management services as an accommodation to Guarantor and that American hereby disclaims all liability for, and Guarantor hereby waives all claims against American which may arise out of or in connection with, the establishment or modification of such air fares or the yield and revenue management services provided hereunder. American agrees to advise Guarantor regarding pricing for such air fares; provided, however, that American shall at all times have the unconditional right in its sole discretion to determine air fares during the Air Service Period.

15. Governing Law.

This Agreement shall be construed in accordance with, and shall be governed by, the laws of the State of Texas without regard to any conflict of law rules.

16. Jurisdiction/Dispute Resolution.

- a. Any controversy, dispute, difference, disagreement or claim between the parties arising under or relating to this Agreement, including any question concerning the validity, termination, interpretation, performance, operation, enforcement or breach of this Agreement (each, a "Dispute") shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules") by a panel of arbitrators appointed in accordance with such Rules. Each of Guarantor and American irrevocably submits to the exclusive jurisdiction of such arbitration and expressly and irrevocably waives its right to bring suit against the other party in any court of law except for the limited purposes of enforcing an arbitral award obtained in respect of a Dispute, or for obtaining any injunctive, temporary or preventative order or similar order available to it under the laws of any jurisdiction having authority over either party, this Agreement or the transactions contemplated hereunder, for a breach or threatened breach by the other party to this Agreement which threatens irreparable damage. Each party, to the fullest extent it may effectively do so under substantive governing law applicable to this Agreement, irrevocably waives and agrees not to assert, by way of motion, as a defense or otherwise, any claim that it is not subject to arbitration. The arbitration panel shall consist of three (3) arbitrators who are knowledgeable about the legal, marketing, and other business aspects of the airline industry, and fluent in the English language. The arbitration may be conducted by only one (1) arbitrator if Guarantor and American agree in advance of the arbitration on a mutually acceptable individual. The arbitration proceedings shall take place in New York, New York, USA, and shall be conducted in the English language.
- b. If there is a Dispute submitted to arbitration and no arbitral award has been issued in connection therewith, any subsequent additional Disputes referred for arbitration (including counterclaims between the parties) will be consolidated in the same arbitration proceeding.

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- c. The arbitral proceeding will not exceed ninety (90) days commencing on the date the last arbitrator accepts his or her appointment. If the arbitral award is not issued within this time, then the arbitration proceeding will be automatically renewed for another ninety (90) days; provided, however, in the event any additional Dispute is added to the proceeding in accordance with Section 16 hereof during the renewal period, the proceeding will automatically be extended for an additional period not to exceed ninety (90) days from the date such additional Dispute is added to the original proceeding. Evidence may not be taken in the arbitral proceeding except in the presence of both parties, and all witnesses, if any, may be questioned by both parties. The decision of the arbitrator(s) must be issued in writing with explanation of its reasoning, and will be final and conclusive when issued.
- d. Each party irrevocably submits to the nonexclusive jurisdiction of the United States District Court for the Southern District of New York and of any State Court sitting in New York, for purposes of enforcing any arbitral award or for other legal proceedings arising out of this Agreement or any transactions contemplated in this Agreement. Each party, to the fullest extent it may effectively do so under substantive governing law applicable to this Agreement, also irrevocably waives and agrees not to assert, by way of motion, as a defense or otherwise, any claim that it is not subject to the jurisdiction of any such court and any objection that it may have as to venue or inconvenient forum in respect of claims or actions brought in such court and any right of application or appeal to any court (in the U.S. or in any other jurisdiction) in connection with any question of law arising in the course of arbitration proceedings or out of any decision or award by the arbitrators.

OFFICE OF THE ATTORNEY GENERAL

1st Floor, P.O. Building

16 OXFORD ROAD

P.O. Box 540

KINGSTON 5, JAMAICA, W.I.

- e. Each party irrevocably designates, appoints, authorizes and empowers as its agent for service of process the Secretary of State of the State of New York or C.T. Corporation System at its offices presently located at 111 Eighth Avenue, New York, NY 10011, to receive and acknowledge on behalf of such party any process, notices, or other documents that may be served in any suit, action, or proceeding of the nature referred to in this Section 16 in any State or Federal court sitting in New York. Each party has empowered the Secretary of State of the State of New York or C.T. Corporation System as its agent for service of process by the granting of power of attorney. Such designation and appointment will continue unless and until notice is given. Nothing in this Section 16. affects the right of any party to serve process in any manner permitted by law, or limits any right that any party may have to bring proceedings against the other party in the courts of any jurisdiction (except as limited in Section 16 hereof) or to enforce in any lawful manner a judgment obtained in one jurisdiction in any other jurisdiction.

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17. Foreign Sovereign Immunity.

Guarantor and American each acknowledge that the transactions contemplated in this Agreement involve commercial activity carried on in the United States of America. To the extent that either party or any of its property is or becomes entitled at any time to any immunity on the grounds of sovereignty or otherwise, including under the Foreign

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Sovereign Immunities Act of 1976 of the United States of America (as amended, modified or supplemented from time to time) or any successor statute thereto, from any legal action, suit, arbitration proceeding or other proceeding, from set-off or counterclaim, from the jurisdiction of any court of competent jurisdiction, from service of process, from attachment prior to judgment or after judgment, from attachment in aid of execution or levy or execution resulting from a decree or judgment, from judgment or from jurisdiction, or such party's liability is limited pursuant thereto that party for itself and its property does hereby irrevocably and unconditionally waive all rights to, and agrees not to plead or claim any such immunity with respect to its obligations, liabilities or any other matter arising out of or in connection with this Agreement or its subject matter. The foregoing waiver and agreement is not subject to withdrawal in any jurisdiction.

18. Force Majeure.

Except as otherwise expressly provided in this Agreement, neither party shall be liable for performance hereunder to the extent such performance is prevented or delayed as a result of acts of God, severe weather, natural disaster, earthquake, fire, war, military action, terrorist action, labor disputes, or any court order or action of any governmental, administrative or judicial entity or by any other reason or circumstance, similar or dissimilar, beyond the reasonable control of such party; provided, however, such party shall (a) provide the other party with prompt written notice thereof, (b) use its best reasonable efforts to avoid or remove such causes of non-performance, and (c) continue performance to the extent such causes are removed or avoided.

19. Indemnification.

- a. American agrees to indemnify, defend and hold harmless Guarantor and its officers, directors, employees, agents and affiliates (the "Guarantor Indemnified Parties") from and against any and all third party liabilities, damages, losses, claims, suits, liens, demands, actions, causes of action, judgments, fines, penalties and expenses (including without limitation reasonable attorneys' fees) of any nature whatsoever (collectively, "Claims") arising out of or in connection with, or related to (i) the willful misconduct or grossly negligent acts, errors or omissions of American, its subcontractors, its affiliates or any person directly or indirectly employed by American, or any of them, while engaged in any activity associated with or related to American's performance under this Agreement; (ii) American's products or services supplied or performed in connection with this Agreement or otherwise; and (iii) American's breach of its obligations under this Agreement.
- b. Guarantor agrees to indemnify, defend and hold harmless American and its officers, directors, employees, agents and affiliates (the "American Indemnified Parties") from and against any and all Claims arising out of or in connection with, or related to (i) the willful misconduct or grossly negligent acts, errors or omissions of Guarantor, its subcontractors, its affiliates or any person directly or indirectly employed by Guarantor, or any of them, while engaged in any activity associated with or related to Guarantor's performance under this Agreement; and (ii) Guarantor's breach of its obligations under this Agreement.

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c. The rights and obligations of the parties under this Section 19 shall survive any termination or expiration of this Agreement.

## 20. Waiver of Consequential Damages.

Except with respect to each party's indemnification obligations hereunder, neither party shall be liable to the other for any special, incidental or consequential damages arising out of this Agreement, even if such party had been advised of the possibility of such damages.

## 21. Insurance.

a. American. At all times during the term of this Agreement, American shall carry and maintain, at its sole cost and expense, airline liability insurance with aggregate limits of at least \$50,000,000 USD for personal injury (including without limitation bodily injury and death) and property damage. If so requested by Guarantor, American will furnish Guarantor within thirty (30) days of such request an insurance certificate which: (i) indicates that the insurer has accepted and insured Section 19.a of this Agreement; (ii) includes the insurer's commitment to give Guarantor not less than 30 days prior written notice in the event of cancellation or material adverse change in coverage; (iii) indicates that such insurance shall not be invalidated by any action or inaction of American and shall insure Guarantor regardless of any breach or violation of any warranty, declaration, or condition contained in such policies by American; (iv) shall waive any right of subrogation, set-off, or counterclaim against Guarantor; (v) shall name the Guarantor Indemnified Parties hereunder as additional insureds; and (vi) indicates that such coverage is primary without right of contribution from any insurance carried by Guarantor.

b. Guarantor. At all times during the term of this Agreement, Guarantor shall carry and maintain, at its sole cost and expense, commercial general liability insurance with aggregate limits of at least \$25,000,000 USD for personal injury (including without limitation bodily injury and death) and property damage. If so requested by American, Guarantor will furnish American within thirty (30) days of such request an insurance certificate which: (i) indicates that the insurer has accepted and insured Section 19.b of this Agreement; (ii) includes the insurer's commitment to give American not less than 30 days prior written notice in the event of cancellation or material adverse change in coverage; (iii) indicates that such insurance shall not be invalidated by any action or inaction of Guarantor and shall insure American regardless of any breach or violation of any warranty, declaration, or condition contained in such policies by Guarantor; (iv) shall waive any right of subrogation, set-off, or counterclaim against American; (v) shall name the American Indemnified Parties hereunder as additional insured; and (vi) indicates that such coverage is primary without right of contribution from any insurance carried by American.

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22. Assignment.

Neither party may assign this Agreement or any interest herein without obtaining the prior written consent of the other party, except that American may assign or delegate this Agreement and the rights and obligations created hereunder to any wholly owned subsidiary of AMR Corporation without the consent of Guarantor.

23. Waivers and Modifications.

This Agreement embodies the entire agreement and understanding of the parties and, as of its effective date, terminates and supersedes all prior or contemporaneous agreements and understandings, whether written or oral, between the parties covering the subject matter hereof. The provisions of this Agreement shall govern all services to be provided hereunder by the parties, and no addition, amendment, waiver, or modification of (or execution of any document contrary to) these provisions shall be effective unless signed jointly by a duly authorized representative of both American and Guarantor.

24. Severability.

In the event that any one or more of the provisions of this Agreement shall be determined to be invalid, unenforceable or illegal, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed as if such invalid, illegal and unenforceable provision had never been contained herein with the remainder of this Agreement being enforced to the fullest extent possible.

25. Relationship of the Parties.

For the purposes of this Agreement each of the parties is an independent contractor, and neither party shall be deemed to be the agent, partner, employee or joint venturer of the other party.

26. Notices.

Any notice required to be given by either party to the other pursuant to this Agreement shall be in writing and shall be deemed to have been properly given if delivered in person, transmitted by facsimile, sent by overnight delivery or sent by registered or certified mail, return receipt requested, addressed to the other party at the following address, and shall be deemed to have been given on the day so delivered, transmitted or mailed:

To American:

American Airlines, Inc.,  
Attn: Walter J. Aue, Vice President, Capacity Planning  
4333 Amon Carter Boulevard, MD 5535  
Fort Worth, Texas 76155  
Fax No.: (817) 931-6670

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To Guarantor:

Jamaica Vacations Limited  
Attn: John Lynch, Chairman  
~~4950 S.W. 72<sup>nd</sup> Avenue~~  
Miami, FL 33155  
Fax No.: (305) 660-5332

64 Knutsford Boulevard  
Kingston, 5 JAMAICA  
876-960-7230

Either party will have the right to change their representative and address for notice to any other location by giving at least five (5) business days' prior written notice to the other party in the manner set forth above.

27. Headings/Construction.

The headings contained herein are for convenience of reference and are not intended to define or limit the scope of any provision of this Agreement.

28. Successors and Assigns.

This Agreement shall be binding upon and inure to the benefit of the parties, their successors and permitted assigns and there is no intent to benefit any third parties.

29. Further Assurances.

Each of the parties shall do and perform, at such party's expense, such further acts and execute and deliver such further instruments and documents as may be required by applicable law or as may be reasonably requested by the other party to effectuate the purposes of this Agreement.

30. Exhibits & Schedules.

~~The Exhibits and Schedules to this Agreement are incorporated into this Agreement and form a part hereof for all intents and purposes.~~

31. No Waiver.

No waiver of a breach of any provision of this Agreement by either party shall constitute a waiver of any subsequent breach of the same or any other provision hereof, and no waiver shall be effective unless made in writing and signed by a duly authorized representative of the waiving party. Except as expressly set forth herein, no delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

32. No Remedy Exclusive.

Except as expressly set forth herein, no remedy herein conferred upon or reserved to a party herein is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and in addition to every other remedy given under this Agreement or now or hereafter existing at law, in equity or by statute. In order to entitle a party to exercise any remedy reserved to it in this Agreement, it shall not be necessary to give any notice other than such notice as may be herein expressly required.

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1st Floor, PICC Building  
16 Oxford Road  
P.O. Box 146  
Kingston 5, Jamaica

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33. Expenses.

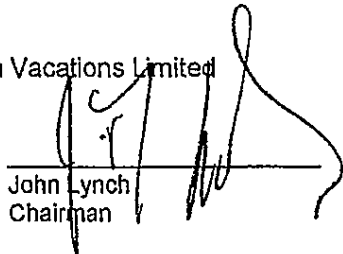
Each party to this Agreement agrees to be responsible for its own costs, expenses and charges (including, without limitation, legal fees, advisory fees and accounting fees) in connection with the preparation of this Agreement and the transactions contemplated hereunder.

34. Counterparts.

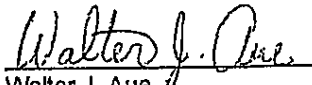
This Agreement may be executed (by fax or otherwise) in counterparts, each of which shall be deemed an original, and which together shall constitute one instrument.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by their duly authorized representatives as of the date first above written.

Jamaica Vacations Limited

By:   
Name: John Lynch  
Title: Chairman  
Date:

American Airlines, Inc.

By:   
Name: Walter J. Aue  
Title: Vice President, Capacity Planning  
Date: 8-11-08

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## SCHEDULE 1 TO AIR SERVICE AGREEMENT BETWEEN AMERICAN AIRLINES, INC. AND GUARANTOR FUEL ADJUSTMENTS

1. If the average price per gallon that American pays for jet fuel ("Average Fuel Price") changes as compared to an average price per gallon of US\$2.92 ("Initial Average Fuel Price"), the Flight Charge for Air Service Flights during any period such changes are in effect ("Fuel Adjustment Period") shall be adjusted as follows (each a "Fuel Adjustment"):
  - a. If the Average Fuel Price increases to US\$3.12 or above at any time during the Term, the Flight Charge for each Air Service Flight during the respective Fuel Adjustment Period shall be increased by an amount equal to the product of the difference between the Average Fuel Price in effect at the time of such Air Service Flight and the Initial Average Fuel Price and the percentage of the Flight Charge covered by fuel cost as determined by American in its sole discretion.
  - b. If the Average Fuel Price decreases to US\$2.72 or below at any time during the Term, the Flight Charge for each Air Service Flight during the respective Fuel Adjustment Period shall be decreased by an amount equal to the product of the difference between the Average Fuel Price in effect at the time of such Air Service Flight and the Initial Average Fuel Price and the percentage of the Flight Charge covered by fuel cost as determined by American in its sole discretion.
2. All Fuel Adjustments will be included in the invoice for the respective Settlement Period or the final report, as applicable, as provided in Section 7 of the Agreement. For the avoidance of doubt, each Fuel Adjustment Period shall begin with the date the Average Fuel Price increases to US\$3.12 or above or decreases to US\$2.72 or below, respectively, and ends on the date the Average Fuel Price decreases below US\$2.72 or increases above US\$3.12, respectively.

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Schedule 1

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SCHEDULE 2  
TO AIR SERVICE AGREEMENT  
BETWEEN AMERICAN AIRLINES, INC. AND  
GUARANTOR  
AIR SERVICE FROM MIA TO MONTEGO BAY, JAMAICA

PROPOSED FLIGHT SCHEDULE

November 2, 2008 – November 18, 2009

Origin	Destination	Days of Operation	Flight Times*
MIA	MBJ	Daily	0940-1110
MBJ	MIA	Daily	1215-1350

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Equipment: Boeing 737\*\*

Present Configuration: 148 seats\*\*

Round Trip Flight Charge: Twenty-Four Thousand Three Hundred Sixty Eight Dollars (\$24,368) per Air Service Flight.

Round Trip Per Revenue Passenger Charge: Thirty-Four Dollars and Thirty-Four Cents (\$34.34) per round trip revenue passenger carried on the Air Service Flights.

Deduction: 3.2% per Air Service Flight.

\*Exact operating times are subject to change from time to time by American at its sole discretion.

\*\*Subject to Section 2.

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SCHEDULE 2  
TO AIR SERVICE AGREEMENT  
BETWEEN AMERICAN AIRLINES, INC. AND  
GUARANTOR  
AIR SERVICE FROM ORD TO MONTEGO BAY, JAMAICA

PROPOSED FLIGHT SCHEDULE

January 31, 2009 – January 30, 2010

Origin	Destination	Days of Operation	Flight Times*
ORD	MBJ	Sunday, Monday, Thursday, Friday, Saturday	0830-1330
MBJ	ORD	Sunday, Monday, Thursday, Friday, Saturday	1440-1750

Equipment: Boeing 737\*\*

Present Configuration: 148 seats\*\*

Round Trip Flight Charge: Fifty Thousand Six Hundred Eighty Six Dollars  
(\$50,686) per Air Service Flight.

Round Trip Per Revenue Passenger Charge: Forty-Nine Dollars and Eight Cents  
(\$49.08) per round trip revenue passenger carried on the Air Service Flights.

Deduction: 3.2% per Air Service Flight.

\*Exact operating times are subject to change from time to time by American at its sole discretion.

\*\*Subject to Section 2.

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Schedule 2

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## SCHEDULE 2 TO AIR SERVICE AGREEMENT BETWEEN AMERICAN AIRLINES, INC. AND GUARANTOR AIR SERVICE FROM DFW TO MONTEGO BAY, JAMAICA

### PROPOSED FLIGHT SCHEDULE

November 02, 2008 – December 17, 2009

Origin	Destination	Days of Operation	Flight Times*
DFW	MBJ	Sunday, Monday, Thursday, Friday, Saturday	1030-1510
MBJ	DFW	Sunday, Monday, Thursday, Friday, Saturday	1620-1930

December 18, 2008 – April 06, 2009

Origin	Destination	Days of Operation	Flight Times*
DFW	MBJ	Daily	1030-1510
MBJ	DFW	Daily	1620-1930

April 07, 2009 – June 10, 2009

Origin	Destination	Days of Operation	Flight Times*
DFW	MBJ	Sunday, Monday, Thursday, Friday, Saturday	1030-1510
MBJ	DFW	Sunday, Monday, Thursday, Friday, Saturday	1620-1930

June 11, 2009 – August 31, 2009

Origin	Destination	Days of Operation	Flight Times*
DFW	MBJ	Daily	1030-1510
MBJ	DFW	Daily	1620-1930

September 1, 2009 – November 18, 2009

Origin	Destination	Days of Operation	Flight Times*
DFW	MBJ	Sunday, Friday, Saturday	1030-1510
MBJ	DFW	Sunday, Friday, Saturday	1620-1930

Equipment: Boeing 737\*\*

Present Configuration: 148 seats\*\*

Round Trip Flight Charge: Forty-Six Thousand Two Hundred Fourteen Dollars  
(\$46,214) per Air Service Flight.

Round Trip Per Revenue Passenger Charge: Forty-Eight Dollars and Nineteen Cents  
(\$48.19) per round trip revenue passenger carried on the Air Service Flights.

Deduction: 3.2% per Air Service Flight.

\*Exact operating times are subject to change from time to time by American at its sole discretion.

\*\*Subject to Section 2.

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EXHIBIT A  
TO AIR SERVICE AGREEMENT  
BETWEEN AMERICAN AIRLINES, INC. AND  
GUARANTOR  
[On Issuing Financial Institution Letterhead]

\_\_\_\_\_, 2008

American Airlines, Inc.  
P.O. Box 619616, MD 5535  
DFW Airport, Texas 75261-9616

To Whom It May Concern:

By order of Jamaica Vacations Limited ("Guarantor"), we hereby open our clean, irrevocable and unconditional Letter of Credit Number ##### in favor of American Airlines, Inc. ("American") for a sum not to exceed US\$1,500,000. This Letter of Credit guarantees payment of a sum up to US\$1,500,000 collectively under the Air Service Agreement dated November 2, 2008, between American and Guarantor related to air service between Miami International Airport ("MIA") and Sangster International Airport ("MBJ").

Funds under this Letter of Credit are available against your drafts drawn on us on sight when presented to our office at Bank Address. All drafts drawn hereunder must refer to the number of this Letter of Credit and be accompanied with a signed statement by a Vice President of American certifying that the amount drawn represents sums unpaid and now due under the above agreement.

It is a condition of this letter of credit that it shall be deemed automatically extended without amendment for a period of one (1) year from the present or any future expiration date, unless at least thirty (30) days prior to any expiration date, we notify you by registered mail or overnight courier service at the above address, that we elect not to consider this letter of credit extended for any such additional period.

Partial and multiple drawings are permitted under this letter of credit. Bank agrees that all drafts drawn and negotiated in compliance with the terms of this Letter of Credit shall be duly honored, if presented at Bank on or before the following specified expiration date.

This credit is subject to the Uniform Customs and Practice for Documentary Credits 1993 Revision ("UCP") International Chamber of Commerce Publication No. 500. As to matters not governed by the UCP, this letter of credit shall be governed by and construed in accordance with the laws of the state of Texas.

This Letter of Credit is effective as of the date first written above and expires on December 18, 2009, and any draft under this Letter of Credit must reach us by that date.

Sincerely,

Name  
Title

Exhibit A

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AD

OFFICE OF THE CONTROLLER-GENERAL  
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**EXHIBIT B  
TO AIR SERVICE AGREEMENT  
BETWEEN AMERICAN AIRLINES, INC. AND  
GUARANTOR  
[On American Airlines, Inc. Letterhead]**

\_\_\_\_\_, 2008

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

Bank Issuing Letter of Credit  
Street Address of Bank  
City State, Zip Code

Re: Irrevocable and Unconditional Letter of Credit Number #####

To Whom It May Concern:

We hereby request that you make immediate and unconditional payment under the referenced Irrevocable and Unconditional Letter of Credit in the amount of US\$#####. Please wire transfer the requested funds immediately as follows:

**CONFIDENTIAL**

Name of Receiving Bank  
Street Address of Receiving Bank  
City, State, Zip Code  
ABA Number of Receiving Bank  
For Credit to the Account of American Airlines Inc.  
Account #: #####  
Advise Request  
Reference: Title of Agreement

The undersigned hereby certifies that he or she is currently a Vice President of American Airlines, Inc., and that this request is made as a result of payments due to American Airlines, Inc. pursuant to that certain Air Service Agreement, dated as of November 2, 2008, between American Airlines, Inc. and Jamaica Vacations Limited or under any other agreement between American and Jamaica Vacations Limited.

Sincerely,

Name  
Title

Exhibit B

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Standard Contract  
John Lynch  
to:  
CJohnson  
09/15/2008 09:36 AM  
Sent by:  
"Mercedes Petrus"  
Show Details



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**From:** Mercedes Petrus  
**Sent:** Monday, September 15, 2008 10:35 AM  
**To:** John Lynch  
**Subject:** FW: Standard Contract

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**From:** Alfson, Gary [mailto:Gary.Alfson@aa.com]  
**Sent:** Monday, September 15, 2008 10:26 AM  
**Subject:** Standard Contract

Mr. Lynch, as previously discussed , and during the drafting of the Minimum Revenue Guarantee Contracts; these contracts are standard contracts agreed to by contracted parties and American Airlines.

There are no special variances issued with any of our customers. The risks involved are the same for all under a standard format.

Please call me with any questions you may have

Gary C. Alfson  
Manager Marketing Development; Miami, Caribbean, Latin America, and Mexico  
Tel # 305-520-3015  
e-mail, gary.alfson@aa.com

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Telephone No. 876-967-3309, 876-967-3310  
Fax No: 876-922-3804  
Website: <http://www.mof.gov.jm>  
Email: [hmf@mof.gov.jm](mailto:hmf@mof.gov.jm)

MINISTRY OF FINANCE AND THE PUBLIC SERVICE  
30 NATIONAL HEROES CIRCLE  
P.O. BOX 512  
KINGSTON  
JAMAICA



June 10, 2008

**CONFIDENTIAL**

Hon Edmund Bartlett, MP  
Minister of Tourism  
Ministry of Tourism  
64 Knutsford Boulevard  
Kingston 5

OFFICE OF THE CONTRACTOR-GENERAL  
1ST FLOOR, PIOJ BUILDING  
16 OXFORD ROAD  
P.O. Box 540  
KINGSTON 5, JAMAICA, W.I.

Dear Minister Bartlett

**Re: Commitment of US\$4.5 million for Airlift/Seat Risk Support on Flights to Jamaica**

With regards to the captioned subject, I advise that you provide American Airlines with the commitment predicated against your existing Budget.

On the understanding that you monitor the programme carefully so as to minimize expenditure on seat support, the Ministry of Finance and the Public Service will support the seat support request and undertakes to include such additional expenditure in the First Supplementary Estimates 2008/09.

Yours sincerely

Audley Shaw, MP  
Minister of Finance and the Public Service

**CONFIDENTIAL**

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July 17, 2008

Hon. Audley Shaw  
Minister of Finance & the Public Service  
30 National Heroes Circle  
Kingston 4

CONFIDENTIAL

Dear Minister:

**Re: Guarantee of US\$4.5M to American Airlines Incorporated by TEF on behalf of Jamaica Vacations**

Over the past weeks, The Ministry of Tourism has been working along with JAMVAC in pursuing discussions with a number of airline representatives with a view to increasing airlift into Jamaica from strategic gateways in the United States. The primary objectives are:

1. To support Jamaica's "Drive for five – five million visitors in five years"
2. To fill the additional rooms that have been introduced into Jamaica as a result of recent investments in the tourism sector.
3. To militate against the potential fall out in air seat availability as a result of a downturn in the airline industry.

American Airlines (AA) has agreed to add additional flights from three gateways in North America namely Chicago Ohare, Dallas Forth Worth and Miami. This could result in an annual increase in excess of one hundred thousand visitor arrivals. The resulting increase in revenue to TEF is anticipated at approximately US\$1M.

The airline however has stipulated a minimum revenue requirement and has insisted on the provision of letters of credit to compensate for any loss of income. In order to establish the "Air Service Agreement" we are required to provide three letters of credit, each in the amount of US1.5 M on the following conditions:

<b>Instrument:</b>	Irrevocable and unconditional letter of credit
<b>Amount:</b>	US\$4.5M (3x \$1.5M)
<b>Tenure:</b>	July 22, 2008 – December 18, 2009
<b>Beneficiary:</b>	American Airlines Incorporated
<b>Issuing Bank:</b>	National Commercial Bank Ltd.
<b>Collateral:</b>	Hypothecated G.O.J. Repurchase Agreement

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AA

July 17, 2008

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Hon. Audley Shaw  
Minister of Finance & the Public Service  
30 National Heroes Circle  
Kingston 4

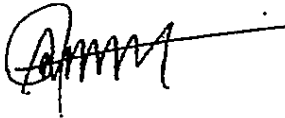
**Re: Guarantee of US\$4.5M to American Airlines Incorporated by TEF on behalf of Jamaica Vacations**

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The Jamaica Tourist Board will embark on a comprehensive marketing programme to support the introduction of these new flights. Marketing activities will take place in areas surrounding the gateways as well as other source markets which link into these hubs.

We are requesting approval from the Ministry of Finance and the Public Service for funds to be guaranteed through the Tourism Enhancement Fund and have enclosed a copy of the proposed agreement as well as the required format of the letter of credit for your perusal. We hope to finalize the agreement by the latest Tuesday, July 22, 2008 and would therefore appreciate you giving this matter your urgent attention.

Yours truly,



Edmund Bartlett, M.P.  
Minister of Tourism

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C.c. Ian Neita - Executive Director, Tourism Enhancement Fund

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(25)

No. 31/08

CONFIDENTIAL

CABINET DECISION DATED 15 SEPTEMBER 2008

Jamaica Vacations Limited – Contractual Arrangement with Airlines for Additional Seat Support

8. The Cabinet considered Submission No. 519/MT-12/08 in connection with a proposal that Jamaica Vacations Limited (JAMVAC) enter into contractual arrangements with airlines for additional seat support, and decided that the matter should be withdrawn from the Agenda to allow for further consultations on the recommendations and alternative proposals, including consultations with the Attorney General's Department.

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REFERRED TO MINISTRY OF

MT

FOR ATTENTION AND SUPPLIED FOR INFORMATION TO

Contractor General

(Sub)

/s/D.S.  
S.C.